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THE INDIAN LAW REPORTS,

BOMBAY SERIES.

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council — C BOULNOIS, *Middle Temple*

High Court — H C KIRKPATRICK, *Lincoln's Inn*; NARÁYAN DÁJI GUPTE, *Pleader*; GANPAT SADASHIV RAV, M A, LL B, *Vakil High Court* } *Assistants*

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Page 175, line 1, *read* "plaintiff" *for* "defendant".

Page 228, line 6, *read* "distinct" *for* "district".

Page 419, *for* "the opponent Keshavbhai" *read* "one Laldás' branch".

JUDGES OF THE HIGH COURT.

Chief Justice.

HON'BLE SIR CHARLES SARGENT, *Knight.*
„ L. H. BAYLEY (*Acting*).

Puisne Judges.

HON'BLE L. H. BAYLEY.
„ R. WEST.
„ J. SCOTT.
„ NÁNÁBHÁI HARIDÁS.
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THE INDIAN LAW REPORTS,

Bombay Series.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

MOTIVAHOO AND ANOTHER, (PLAINTIFFS), *v.* VINA'YAK VEERCHAND, (DEFENDANT).*

1887. *August* 19.

Vendor and purchaser—Auction sale by mortgagee of mortgaged property—Conditions of sale—Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Construction—Such condition implies possession of some title in vendor.

R. having stolen from N. the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to N., deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one :—"The vendor shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced, a notice on behalf of N. was read out to the persons then present, which stated that she claimed the property as absolute owner, and that R., (who had mortgaged it to the vendors,) had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival he was told of N.'s claim. He was told nothing to make the above condition of sale misleading. He bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently

* Small Cause Court Reference; Suit No. 11377 of 1886.

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ascertained that R. had no interest in the property, and thereupon he called upon the plaintiffs, (the mortgagees), to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he having failed to do so, they filed this suit against him, to recover the balance of the purchase money.

Held, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary.

THIS was a reference by the Full Bench of the Bombay Court of Small Causes under section 69 of the Small Cause Court Act XV of 1882.

The plaintiffs as mortgagees of a certain immoveable property in Bombay sold the mortgaged property by auction to the defendant for Rs. 1,075 on the 18th January, 1886. The defendant paid Rs. 270 as deposit at the time of purchase. The present suit was brought by the plaintiffs to recover from the defendant the balance (*viz.*, Rs. 805) of the purchase-money with interest. The defendant refused to complete the purchase, unless the plaintiffs could give him a good title to the property; and required them, in the event of their being unable to do so, to refund the deposit which he had paid.

The following were the facts of the case :—

In April, 1848, one Vánársibái, (wife of Dámodar Jagannáth), purchased the land in question for the sum of Rs. 800, which was her own separate property. At that time no deed of conveyance was executed. Subsequently, by a bond dated the 30th July, 1851, she mortgaged the land for Rs. 451 to one Gopikábái, who was the mother of her (Vánársibái's) daughter-in-law, Náthibái; and on the same day she assigned her equity of redemption to Náthibái.

On the 31st December, 1851, Vánársibái obtained a formal deed of conveyance executed to herself by her vendor.

On the 27th August, 1860, Náthibái, who, as above stated, had the equity of redemption vested in her, and who was then in occupation of the land, obtained from Gopikábái, (the mortgagee), an

assignment of her mortgage, and thus became absolute owner of the property.

In 1861 or 1862, Dámodar Jagannáth, (the husband of Vánársibái), adopted a son, named Rámchandra, who, during the lives of Dámodar and Vánársibái and after their death, resided with Náthibái in the house situated upon the property in question. Dámodar died in 1868, and Vánársibái in 1874.

In 1878, Rámchandra became insolvent, and obtained his discharge under section 47 of the Indian Insolvent Act (Stat. 11 and 12 Vic., Cap. 21). In 1883, during the absence of Náthibái, he, (Rámchandra), stole out of her box the title-deeds relating to the said property, and, after depositing them with the plaintiffs, executed in their favour a deed of legal mortgage with power of sale, dated the 8th June, 1883, to secure the repayment of Rs. 1,000 lent to him by the plaintiffs; and on the 21st January, 1885, he executed to them a deed of further charge for Rs. 500.

In 1885 he became insolvent a second time, and again obtained his discharge under section 47 of the Insolvent Act. In his schedule he did not enter the plaintiffs as mortgagees of the property.

The plaintiffs, in execution of the power of sale contained in their mortgage, put up the property to auction, subject to certain conditions of sale; the ninth condition being in the following words:—"The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him."

The sale took place on the 18th January, 1886. Before it commenced, a notice on behalf of Náthibái was read out to the persons then present, which stated that she claimed the property as absolute owner, and that Rámchandra, who had mortgaged it to the plaintiffs (the vendors), had no interest in it of any kind. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun; but on his arrival he was told of Náthibái's claim. He, notwithstanding, bid for the property, and ultimately became the purchaser, for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an

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agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that Rámchandra had no interest in the property; and thereupon by a notice dated the 13th February, 1886, called upon the plaintiffs to make out a good title, or to repay him his deposit.

On the 5th March, 1886, the plaintiffs replied; and, relying on the ninth condition of sale, required him to complete the purchase within eight days. The defendant having failed to do so, the plaintiffs filed this suit on the 5th January, 1886, in the Small Cause Court to recover the balance of the purchase-money,

The suit was heard on the 29th July, 1886, by the Chief Judge, (Mr. Hart), who delivered the following judgment :—

"This is an action by the vendor of a house against the purchaser to recover the balance of the purchase-money. The facts are peculiar, and give rise to a question of law of some nicety. There is no real contest as to them. As admitted, not disputed or proved, they are as follow :—

"The land, on which the house now stands, was purchased in 1848 by Rávji *alias* Bálkrishna Bháskar from Morobá Náráyanaett with possession, but no conveyance was executed until the 25th April, 1848. The deed executed on that date expresses the consideration to be the payment of Rs. 600 to Morobá by Rávji, and contains covenants for title and further assurance. It was registered in the Collector's office on the 19th May, 1848. In the meantime on the 1st April, 1848, the purchaser Bálkrishna had resold the land to Vánársibái, the wife of Dámodar Jagannáth, for Rs. 800 with possession, but no conveyance was executed till the 31st December, 1851. This deed contains covenants for title, quiet possession, and further assurance, and was registered in the Collector's office on the 20th March, 1852.

"Of the consideration money (Rs. 800) to be paid by Vánársibái to Rávji, Rs. 401 had been allowed to remain on mortgage of the land and house, (which is now mentioned for the first time), for the repayment of which Vánársibái bound herself by a bond of even date with the sale to herself (1st April, 1848), in the penal sum of Rs. 802, conditioned for avoidance on payment of Rs. 401, with interest at 3 *per cent. per mensem*.

"This bond, which is unregistered, after reciting the loan of Rs. 401, the agreement to repay it within four years, and the mortgage as collateral security, contains a power to Rávji of entry and sale in case of default on payment to him of the sum due within the stipulated time of four years. An endorsement, dated 30th July, 1851, shows that Rs. 300 were paid on account on that date, and an enfacement dated 10th May, 1852, shows that the bond was 'paid in full' on that day; and the execution and the attestation, one of the latter being that of Vánársibái's husband Dámodar, are cancelled by erasure.

"From two letters of the 28th July, 1851, passing between Dámodar Jagannáth and one Harischandra Ranchodji it appears that the premises were admittedly the

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separate property of Vánársibái, and that she was desirous at this date of raising by the mortgage of them the money necessary to pay off the mortgage to Rávji. Accordingly we find on the 30th July, 1851, a bond executed by Vánársibái and attested by Dámodar (among others) in the penal sum of Rs. 902 conditioned for avoidance on payment by Vánársibái to Gopikábái, the wife of Harischandraji Ranchhodji, of Rs. 451, with interest at 2 *per cent. per mensem* within ten years.

"This bond, which is unregistered, after reciting the loan and agreement for repayment with interest, contains an assignment of the premises by way of mortgage by Vánársibái to Gopikábái, together with deposit of title-deeds, building certificate, and bills for ground-rent and assessment, and a covenant against otherwise encumbering the property. Under date 27th July, 1852, is an endorsement of payment of Rs. 50 on account.

"On the same 30th July, 1851, Vánársibái by an unregistered Maráthi deed assigned her equity of redemption to Gopikábái's daughter Náthibái, the widow of Harischandra, a predeceased son of Dámodar and Vánársibái. The consideration for this assignment was said to be the contribution by Náthibái of a portion of the Rs. 451, (the consideration money for the mortgage to Gopikábái), and of the proceeds of her personal ornaments.

"On the 26th July, 1852, Gopikábái by another unregistered Maráthi writing released to Vánársibái all her claims in respect of interest, (both past and future), on the above-mentioned loan of Rs. 451. In this deed are recited the mortgage of the premises by Vánársibái to Gopikábái for Rs. 451 for the purpose of payment to Balkrishna Bhaskar, the deposit of the deeds by Vánárshibbái with Gopikábái, and the agreement that for the future no interest should be charged on the mortgage to Gopikábái. The consideration for this arrangement is said to be the relationship between the parties, and the giving by Vánársibái to Náthibái and Ganpatráv, her son by Harischandra, of an 'authority paper,' the reference apparently being to the last-mentioned Maráthi assignment of the equity of redemption. The deed then closes with a provision that as no interest is to be charged, and it will be unnecessary to let any part of the house to a tenant, Vánársibái and her husband should live in the house with their daughter-in-law, Náthibái, and their grandson, Ganpatráv.

"By an unregistered English deed of the 27th August, 1860, Gopikábái, in consideration of natural love and affection, assigned to Náthibái the bond of the 30th July, 1851, and the debt secured, and all benefit derived therefrom, and all the estate, right, title, interest, property, claim, and demand whatsoever both at law and in equity of Gopikábái into or concerning the same.

"No further payment has been made on account of the bond so passed by Vánársibái to Gopikábái and by her assigned to Náthibái.

"In 1861 or 1862, Dámodar Jagannáth adopted a son, Rámchandra Dámodar, in the place of his grandson, Ganpatráv, who was the son of his predeceased son Harischandra, and who had died shortly before.

"On the 16th February, 1867, Vánársibái mortgaged the property for Rs. 500 to Rámchandar Sakhárám. This deed, attested by Dámodar, was acknowledged

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before the Sub-Registrar of Bhuleshvar on the 27th April, 1867, and by him registered on the 29th May, 1867. It contains covenants by Vánáraibái for repayment title, quiet enjoyment, and further assurance, with a proviso for redemption and reconveyance and a power of sale to the mortgagee after one month's notice in case of default, and to call in the mortgage immediately in case of destruction or injury of the mortgaged premises by fire or tempest. Endorsements show the payment on account from time to time of various sums aggregating Rs. 340.

"In 1868, Vánáraibái died, and on the 16th December, 1872, her husband Dámodar and adopted son Rámchandra executed a deed of further charge to Rámchandra Sakhárám for a further advance of Rs. 300. After reciting the last-mentioned mortgage by Vánáraibái, and her death, leaving the present mortgagors her sole legal representatives, the deed purports to convey the premises to Rámchandra Sakhárám in consideration of the sum of Rs. 800, with a proviso for redemption and reconveyance and covenants by the mortgagors for repayment and title and power of entry to the mortgagee in case of default in payment, with a covenant for further assurance. There is also a power of sale to the mortgagee with a proviso that it shall not be exercised without default or notice, but is not conditional thereon, and provisoes regarding the application of the purchase-money and the reservation of the right of foreclosure. This deed was registered on the 31st December, 1872. Default being made in payment of the mortgage last mentioned, the mortgagee exercised his power of sale by public auction on the 2nd January, 1878, when the property was knocked down to Lakshman Vishvanáth for Rs. 925.

"The conveyance dated 5th January, 1878, executed by Rámchandra Sakhárám to Lakshman Vishvanáth, after reciting the last-mentioned mortgage, the death of Dámodar in 1874 leaving Rámchandra Dámodar his sole heir, the default in payment of the mortgage, and the auction sale, conveys the property to Lakshman in consideration of the sum of Rs. 925 and covenants for further assurance. Almost immediately after this, Lakshman Vishvanáth resold and reconveyed to Rámchandra Sakhárám for Rs. 1,000 on the 14th February, 1878.

"In 1878, Rámchandra Dámodar filed his petition and schedule in the Insolvent Court, and entered Rámchandra Sakhárám as an admitted creditor for Rs. 619. In the remarks column the insolvent admits the mortgage by his adoptive father and herself for Rs. 800, and states that the purchase at the auction sale was by the mortgagee in the name of a nominee for Rs. 925.

"To this point, then, it would appear that, despite the assignment to Náthibái of the equity of redemption and the mortgage-bond, Vánáraibái and her representatives had continued to act as though they were still absolutely entitled to deal with the property. But there is nothing to shew that Náthibái was aware of their so doing.

"In 1879, Rámchandra Sakhárám sued in this Court to eject Náthibái and Rámchandra Dámodar, who still continued to live in the house. At the trial, Rámchandra Dámodar swore he had no interest in the premises. Náthibái set up her present claim, and the plaintiff's pleader elected a non-suit.

"By an indenture of the 8th June, 1883, Rámchandra Dámodar mortgaged the premises to the present plaintiffs for Rs. 1,000, with powers of sale and entry and

covenants for title and further assurance, and on the 21st January, 1885, he executed a deed of further charge for Rs. 500.

"In a second schedule, filed in the Insolvent Court in 1885, Rámchandra Dámodar has entered the present plaintiffs as admitted creditors for the sums of Rs. 1,000 and 500, which in the remark column he describes as due on 'bonds,' but without mention of any deed of mortgage or of the house as a security. Default having been made by Rámchandra Dámodar in payment of the last-mentioned mortgage and further charge, the plaintiffs on the 8th January, 1886, advertised the property for sale by auction on the 18th.

"At or just before the sale, Náthibái caused printed hand-bills, dated the 17th January, 1886 to be distributed, setting up her title to the property as the rightful and absolute owner in possession for many years past, and denying that she had ever created or authorized Rámchandra Dámodar to create any encumbrance, or that the plaintiffs or any one else had any right, title, or interest in the property.

"The sale, however, proceeded, and was held subject to certain conditions of sale, which were read aloud before the bidding commenced. The only one of these material to the present suit is the ninth condition, which runs as follows:—'The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.'

"The defendant, who is an assistant surveyor in the Collector's office on a salary of Rs. 90 *per mensem*, first heard of the intended sale on the day it took place. He knew nothing of the property, but was very anxious to buy, presumably for the purpose of reselling at a small profit during the month allowed him by the conditions of sale for completion. This he would probably not find much difficulty in doing, as the property is conveniently situated on the main road. He, accordingly, attended the sale shortly after the proceedings had commenced, but he heard this ninth condition read. He made the last and highest bid for Rs. 1,075, for which sum the property was knocked down to him.

"Náthibái's notice was not read to, or in the hearing of, the defendant, but while the bids were going on he heard the second plaintiff and his agent Bhiku announcing generally to the bystanders that the old woman living in the house claimed to be the absolute owner.

"After the property had been knocked down to the defendant, the Pársi auctioneer informed him that Náthibái was the claimant. Defendant then signed the conditions of sale and an agreement to pay the balance of the purchase-money within a month, and paid the deposit of Rs. 270, or 25 *per cent.*, as provided by the third condition of sale.

"On the 21st January, 1886, Rámchandra Sakhárám sent through his solicitor a notice to the defendant, stating the mortgage and further charge to himself and his sale to, and subsequent purchase from, Lakshman Vishvanáth in 1878, and required him not to complete the purchase. The defendant then making further inquiries discovered that Rámchandra Dámodar had never had any title to the premises, and consequently that his mortgagees could make no title to them. He accordingly

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through his solicitors sent the plaintiffs a notice of the 13th February, 1886, calling on them to satisfy him that they had a good title, or to refund the deposit. To this they replied through their solicitors on the 5th March, 1886, relying on the ninth condition of sale, and calling on the defendant to complete the purchase within eight days. The defendant not having complied with this requisition, this suit was filed on the 5th May, 1886, for the balance of the purchase-money, Rs. 805; and, under the eighth condition of sale, for interest thereon, Rs. 15-8, at 9 *per cent. per annum* from the 19th February, 1886, the date allowed by the fifth condition of sale for the completion of the purchase.

"It is clear, from the facts above stated, that the plaintiffs, as the mortgagees of Rámchandra Dámodar, could give the defendants no title whatever to the premises, unless Rámchandra Dámodar acquired one between the date of his declaration on oath in this Court in 1879 that he had no interest whatever in the property and the date of his mortgages to them in 1883 and 1885. It is not pretended that he ever acquired any such title, and in his own evidence in this suit he admitted that during the illness of Náthibái he purloined from her box the registered conveyance of the 25th April, 1848, and the 31st December, 1851, the unregistered cancelled bond of the 1st April, 1848, and a few municipal bills made out in Vánsaribái's name, and that he showed those without the authority or knowledge of Náthibái to the second plaintiff, who was thereby induced to take the mortgage from him, and retained in his own possession all the documents so shown to him, except the cancelled bond, which he returned to Rámchandra Dámodar, who put it back into Náthibái's box.

"But it is said though the vendors can give no title, they are excused from being called on to do so by the ninth of the conditions of sale under which the purchaser bought. The vendors do not pretend that they have any title. They simply sell as the mortgagees who have paid their money, it may be on an insufficient title, and now only want to get their money back without giving any thing more than they got in exchange, when the purchaser will stand exactly in their place. Of course a man selling property to another without condition is impliedly bound himself to have and to give to his purchaser a title to that property. But equally of course he may relieve himself of that implied obligation by special contract; and if the purchaser chooses to buy subject to such terms, he will be bound by them. The question, then, is one of the construction of the condition of sale. The points to be considered in such a case are clearly pointed out in *Best* v. *Hamand* (1). Does the condition oblige the purchaser to assume a fact material to the title as proved; or does it merely exonerate the vendor from proving it? In the former case the purchaser must complete, even should he find on inquiry the fact assumed to be incorrect. In the latter he is only debarred from calling on the vendor to prove it; but, if he can himself show *aliunde* that it is incorrect, he will not be held to his bargain. Of the former class of cases *Spratt* v. *Jeffery* (2) is an instance; of the latter, *Waddell* v. *Wolfe* (3).

"The present case, I think, belongs to the former class. On a fair construction of the words of the condition as they stand, I think their object is not to relieve

(1) L. R., 12 Ch. Div., 1. (2) 10 B. & C., 249. (3) L. R., 9 Q. B., 515.

the vendor from establishing a fact necessary to the title which it may be difficult or expensive or otherwise inconvenient for him to prove, but to oblige the purchaser to take only so much as the vendor has to give him. In fact, the words of this condition seem to me closely to resemble those of the condition in *Spratt* v. *Jeffery* (?) in which it was held that the purchaser agreeing to purchase the premises 'as the vendor held them' was bound to take them in spite of a defect in the vendor's title. This case has been disapproved in subsequent decisions; but see Dart's Vendors and Purchasers (5th ed.), Vol. 1, pp. 145 and 140, and note (*m*) thereto.

"But, then, another point arises, not so much on the words of the condition, as on their effect. It is the duty of the vendor to inform the purchaser of all facts within his own knowledge material to the title; and though the words of the condition may be quite explicit, yet if by reason of the misstatement or suppression of a fact, which the purchaser was entitled to know and the vendor bound to communicate, their effect is to mislead the purchaser, he will not be bound.

"In the present case there is nothing misleading in the actual words of the condition. They do not pretend that the vendors have or can make any title. On the contrary they seem to me rather to suggest the possibility that the vendor's title may be defective. Nor does there seem to me any pretence for saying that the vendors knew, either when they took the mortgage or when they advertised the sale, that they had no title. The fact that they advanced on the security of the premises a sum nearly, if not quite, equal to their full value, is to my mind an argument against the former theory more cogent than any inference to be drawn from the fact that the document shown to them by Rámchandra Dámodar when obtaining the loan discloses no legal title in himself. For it must have been a fact notorious in the neighbourhood that he was the adopted son of Dámodar Jagannáth and Vánárabái, and their only representative on their death. Nor is there any thing to show that, in the interval between the mortgage and the sale, any fact had come to the knowledge of the mortgagees tending to show any defect in their title.

"But at the time of the sale the plaintiffs knew of Náthibái's claim as stated in her handbill, and the case of *Heywood* v. *Mallalieu* (2) is an authority for holding that even where the condition is explicit yet if there be within the knowledge of the vendor at the time of the sale a material fact not disclosed by the condition as to which he then makes an insufficient statement, the condition will be held to be misleading. In that case the condition of sale stated explicitly that the property comprising a dwelling-house was sold subject to all existing easements, but specified no particulars of any easement. Before the sale the vendor's solicitors had been informed of the particulars of an alleged easement, which, if it existed, would practically render the house useless as a dwelling, but he forbore to make any further inquiry as to its existence at the time of the sale. In answer to questions regarding the alleged easement, he replied, in general terms, that certain rights were claimed, but he could not tell whether there were any, and the auctioneer thereupon told the purchasers that they might dismiss from their minds all

(1) 10 B. & C., 749. (2) L. R., 25 Ch. Div., 357.

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thoughts about the rights in question, as he was sure they would never be heard of again. In these circumstances it was held that the condition was misleading and not binding on the purchaser.

"In the present case the vendors were informed of Náthibái's claim only just before the sale, when they had no opportunity to make any inquiry into it, and then only in the most general possible terms. All the information they had at the time they admittedly imparted in full to the defendant.

"But the defendant says they also stated that the old woman had no claim. Of course if they made this as a statement of fact which they had actually ascertained to be true, it would be a misstatement such as would make the condition misleading, and at the least throw on the vendors the *onus* of proving that the purchaser was not misled by it. I am of opinion that, if these words were used, they were merely as a statement of opinion, not of fact, for the defendant admits that they were not said in answer to any question, nor addressed to any person in particular. And he says that, from his own experience as a surveyor in the Collector's office, he is of opinion that on such occasions old women, who have no real rights in the property, generally do advance unsustainable claims in similar terms.

"Lastly, I am of opinion that it is by no means satisfactorily proved that these words were used by the vendors. The misstatement was no part of the defendant's original case. It is not alleged in the correspondence, nor did he say a word about it in his examination-in-chief. It was only in his cross-examination, when obliged to admit that he had been informed by the vendors that the old woman who lived in the house claimed to be the absolute owner, that he added, but they said she had no claim. No other witness than the defendant himself speaks to the use of such words by any one, and he is somewhat vague as to the exact words used and the person who used them. On the other hand, there was no necessity for the vendors to use such words. After imparting, as they did, all the information they had from Náthibái's handbill regarding her claim, they might safely rely on their conditions of sale, and there was no reason for them to discuss the goodness or badness of her claim. I must, therefore, hold that no case has been made out of a misstatement such as would render the condition misleading. That condition, in my opinion, not being a misleading one in itself, and obliging the purchaser to accept only such title as the vendors have to give, it follows that my judgment must be for the plaintiffs for the amount claimed, and costs.

"Verdict for plaintiffs Rs. 820-8 and costs Rs. 51 certified."

From this judgment the defendant appealed to the Full Court composed of the Chief and Second Judges, who granted him a rule for a new trial, on the three following grounds :—

(i) That the Court had no jurisdiction to entertain the suit ;

(ii) That on the facts as found the suit should be dismissed ;

(iii) The discovery by the defendant of fresh evidence subsequent to the hearing.

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At the argument of the rule the Full Court were unanimously of opinion that the rule should be discharged on the first and third grounds, and took time to consider their decision on the second; and on the 9th November, 1886, the following judgments were delivered:—

Mr. SPENCER, Second Judge:—"This suit is brought to recover from the defendant the balance of the purchase-money of a house which was put up for sale by auction under the instructions of the plaintiff, and knocked down to the defendant as the highest bidder. The Chief Judge has found, on the evidence, that the plaintiff as mortgagee never acquired any title whatever to the property, and that consequently he could give none to the defendant. It follows that, if the defendant is required to pay the purchase-money, he will get no consideration whatever for his payment. The sale was subject to certain conditions, the ninth of which runs as follows:—'The vendors shall not be bound to give a better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him.' The tenth condition further provides for an abstract of title being prepared by the vendors. The question we have to decide is whether, having regard to the facts as found under the conditions above quoted, the defendant can be compelled to complete his purchase. Neither, from the Chief Judge's judgment, that it was in some way orally made known to the purchaser at the sale that the plaintiff was selling as mortgagee; but the conditions of sale themselves, which is a most inartificially prepared document, do not state in what capacity he is selling—whether as mortgagee or as a previous purchaser, or one who has succeeded to the property by inheritance. The conditions simply state that some property will be put up for sale. There is no description of the property, though the conditions state what consequences shall follow if the description proves to be incorrect, and they conclude with the clause I have already set out.

"Furthermore, no abstract of title was prepared for inspection by the purchasers. They were left in entire ignorance of the title they were buying. The Chief Judge in his judgment observes: 'Of course a man selling property to another without condition is impliedly bound himself to have and to give to his purchaser a title to that property. But equally of course he may relieve himself of that implied obligation by special contract; and if the purchaser chooses to buy subject to such terms, he will be bound by them.' The question, then, is one of the construction of the condition of sale. Does such a condition, as we have in this case, protect a man who sells, not with a defective title, but with no title whatever? No doubt the text books when treating on particulars and conditions of sale do state the proposition in very broad terms, that a purchaser 'is bound by a clear stipulation as to title, *e. g.*, an agreement by assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen;" or that the purchaser should only have the receipt and conveyance of A., (an equitable mortgagee), and the assignees; an agreement by ordinary vendors to convey "such title as they have received from

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A. and B.;" and a condition that the purchaser should accept the vendors title "without dispute;" or should "accept such title as the vendor has" '—Dart's Vendors and Purchasers, Vol. I, p. 150. But, so far as I have been able to refer to the cases cited in support of this proposition, there is not one in which the Courts have compelled a purchaser to complete his contract when the vendor has no title whatever to give. In all the cases there has been some defect of title on which it has been held the purchaser has precluded himself, under the conditions of sale, from relying to get out of his bargain. The object of special conditions of sale, according to the reported cases, is, first, to protect the vendor from inquiries which he himself may be unable to satisfy, and against objections which he cannot explain away; or, secondly, to oblige a purchaser to assume a particular fact material to the title as proved. A series of decisions have established the distinction between these two classes of cases, but I have been unable to discover any case which has gone beyond them. The cases of *Best* v. *Hamand*(1) and *Spratt* v. *Jeffery* (2) are good examples of the latter class of cases. In *Best* v. *Hamand* (1) the defendant had contracted to purchase land which had once belonged to a railway company and had been sold by the company as surplus land. One of the conditions of sale was that the purchaser should assume that the company had done all that was required by the Land Clauses Act to enable them effectually to sell and convey the land as surplus land. On inquiry it was ascertained that the former owner of the land had not waived his right to pre-emption, and the title was objected to on that ground. The Court, however, held that the purchaser was bound by the stipulation to admit the title of the company to sell to the vendor. In *Spratt* v. *Jeffery*(2) the plaintiff sold to the defendant two leases of claim premises with the good-will of the business carried on therein 'as he held the same, without requiring the lessor's title' The lessors were trustees, and one of the leases was in reversion which they had no power to grant The Court held that the meaning of the agreement was that the vendee was to purchase the leases without inquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title. The circumstances of these two cases differ entirely from the present. In both of them the purchasers would undoubtedly receive some consideration for their money. In *Best* v. *Hamand* (1), if the first owner exercised his right of pre-emption, he would have been bound to recoup the purchaser his outlay. In *Spratt* v. *Jeffery* (2) the assignor of the leases was in actual possession of the property, and it did not appear that the defendant, the assignee, would have been disturbed during the currency of the lease, and if he were, he had a remedy against the trustees in damages. In both cases the Court decided that the stipulations were a fair warning to the purchasers that there was something doubtful in the title as to a particular point. I do not think that from either of these cases can the principle be deduced that the Court would have compelled performance of the contracts if the vendors had no title whatever The strongest case I have been able to find in support of the plaintiff's contention is *Firme* v. *Wright*(3), which was a sale by the assignee of a bankrupt under such title as the bankrupt recently held the same, an abstract of which may be seen. I have not

(1) L. R., 18 Ch. Div., 1 (2) 10 B. & C., 249. (3) 4 Madd., 364

been able to refer to the report of this case, and am, therefore, ignorant of its facts; but the observations of Page Wood, V.C., on the case in *Edwards* v. *Wickwar* (1) are pertinent to the present inquiry. His Lordship observes:

There may be cases like *Freme* v. *Wright* (2) where assignees of a bankrupt have stipulated that such title only as the bankrupt had should be required by the purchaser, but even in that case it has been thought a stretch of the jurisdiction of the Court to force the title on a purchaser.' What I have cited was, no doubt, an *obiter dictum*, but it is the *dictum* of a very eminent equity Judge, who was afterwards Lord Chancellor. I have said that if the conditions of sale are unambiguous, the Courts will compel a purchaser to accept a defective title. It may be asked what is a defective title? Is a scintilla of title sufficient to enforce performance? The answer to this is that no hard and fast rule can be laid down; each case must depend on its own special circumstances and the conditions of sale. It is sufficient to say that, in my opinion, a Court of Equity will not decree specific performance when property has been sold with such a condition as we are now considering if the vendor has (as it has been found in this case) absolutely nothing to sell. For the reasons I have given, I am of opinion that this suit cannot be maintained, and ought to be dismissed."

Mr. HART, Chief Judge:—"I am unable to concur unreservedly. Though I felt and still feel doubt as to the correctness of my original judgment, yet as all the points suggested by the learned Second Judge were present to my mind and considered by me before delivering it, I think the best course would be for me to adhere to it, and obtain the opinion of the High Court on a reference which I should have been willing to make in the first instance had I been asked to do so.

"The doubt which most pressed me was that which apparently most influenced the Second Judge in arriving at a contrary result, *viz.*, that the reported cases in which the purchaser was held to his bargain seem to be cases in which what was sold was a defective title, whereas here it is no title. But this seems to me a question of degree only, not of principle. If the purchaser is bound by the condition to pay for whatever the vendor can give, I apprehend the principle is the same whether what can be given is all or a good deal or little or nothing. Stress is laid on the *obiter dictum* in *Edwards* v. *Wickwar* (3) throwing doubt on *Freme* v. *Wright* (4). In spite of the great respect undoubtedly due to the opinion of the learned Judge enunciating that *dictum*, I am unable to attach great importance to it, not only because it was not necessary to the decision of the case before him, nor because he omits to specify any case or authority in which or by which the decision in *Freme* v. *Wright* was held to be 'a stretch of the jurisdiction of the Court,' but also because that decision is cited without disapproval as settled law in all the latest editions of all the best text-writers: see Davidson's Conveyancing (4th ed.); Dart's Vendors and Purchasers (5th ed.); and Fry's Specific Performance (2nd ed.). On the other hand, *Hume* v. *Pocock* (5) is an authority for holding that a condition of sale may preclude a purchaser from

(1) L. R., 1 Eq., 68, at p. 70.
(2) 4 Madd., 364.
(3) L. R., 1 Eq., 68.
(4) Madd., 364.
(5) 1 Ch., 379.

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showing that the vendor has no title, and is so cited in Seton on Decrees (4th ed.).

"Another doubt that suggested itself to my mind was, whether the plaintiffs having notice, in general terms, of a claim by Náthibái were bound to postpone the sale for the purpose of sifting it. I can find no authority for saying a vendor is bound to investigate his own title. That is the duty of the purchaser. No doubt, if the vendors had sifted Náthibái's claim, and found the title was in her, and not in them, and had then misrepresented or suppressed the result of their investigation, as in *Heywood* v. *Mallalieu*(1), the sale would not be upheld. But they made no such investigation, and there is no reason for saying they ought to have made it, but did not, because they knew or suspected what the result would be. Probably they thought, as the purchaser admits he thought, that 'old women generally do make such claims without any grounds.' On the other hand, they did give the purchaser all the information they had themselves, *viz*, that Náthibái 'claimed to be the absolute owner of the property.' He, however, chose to buy admittedly 'on his own judgment,' and because he thought 'old women generally do make such claims without any grounds.' In other words, he bought, subject to the ninth condition of sale, a chance which he thought at the time to be a good one, but which turned out to be a bad one. It is not, therefore, in my opinion, strictly correct to say that the defendant purchased without any consideration whatever. I am unable to see that the fact, that no abstract of title was prepared before the sale for the inspection of intending purchasers, affects the question. The tenth condition does not provide for this, and it was not contended before me that the vendors were bound to follow such a course, which would certainly be an unusual one.

"On reconsideration, then, I adhere to my former opinion, that the plaintiff is entitled to recover, and that this rule ought to be discharged."

It will be seen, from these judgments, that the point on which the Judges differ is not as to the meaning of the words in the ninth condition of sale, but as to the effect which the Court ought to give to that condition.

The question, then, which we respectfully submit for the opinion of their Lordships the Judges of the High Court is, whether the defendant purchasing under the said ninth condition of sale in the facts hereinbefore set forth is liable to pay to the plaintiffs the balance of purchase-money. If the answer be in the affirmative, the present decree for the plaintiffs will stand, and execution, which has been stayed pending this reference, will be ordered to issue thereon. If the answer be in the negative, the decree will be set aside, and the suit will be dismissed with costs to the defendant, to be paid by the plaintiffs, Rs. 51; costs of the rule for a new trial, also Rs. 51, will abide the result of the reference.

No sum has been ordered to be deposited in this Court to cover the costs of the reference, as is usual, as this is not a reference sought by either of the parties, but is necessarily made by the Court on a difference of opinion between the Judges, under the provisions of section 69 of the Small Cause Court Act.

No one appeared for the plaintiff.

(1) L. R., 25 Ch. Div., 317.

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Vicáji for the defendant:—Although this suit is, in form, to recover a sum of money, it should rather be regarded as a suit for specific performance, to compel the defendant to complete the purchase. There is no provision in the Specific Relief Act and no decision in any Court in which a vendor, having neither title nor possession, has been given specific performance against the purchaser.

The ninth condition of sale implies that the vendors can give a positive title of *some* kind; but here neither the vendors nor their mortgagor can make out any title at all. In an unreported case of this Court, *Byramji Jijibhái* v. *Parmanandás Jivandás*, it was decided that a condition of sale similarly worded imported some title to be given by the vendor. That decision was based on the case of *Seaton* v. *Mapp*[1], which showed that special conditions of sale, excluding the purchaser's ordinary right of obtaining a good title, ought to be strictly construed against the vendor and in favour of the purchaser. The cases cited in the Court below are distinguishable from the present, inasmuch as in every one of them the vendor had some title to give to the purchaser.

Assuming the ninth condition covered a case of no title on the part of the vendors, who acted at the auction-sale of the 18th of January, 1886, with the utmost good faith, there was a common mistake on the part of both parties to the sale. Both of them believed that there was some title to be made by the one and accepted by the other; and, according to *Cooper* v. *Phipps*[2] and cases of that class cited by Pollock in his Principles of Contract (2nd ed.), p. 427, the purchaser must be relieved from the effects of that common mistake. It was also within the special knowledge of the vendors that their mortgagor had become insolvent in 1885, and they ought to have made mention of that circumstance in their conditions of sale, so as to have put intending purchasers on enquiry. *In re Banister*; *Broad* v. *Munton*[3] and *In re Marsh and Earl Granville*[4] show that the vendors are bound to disclose the whole of the truth within their knowledge.

SARGENT, C.J.:—It must be taken as found, for the purposes of this reference, that the vendor had no title whatever, being a

(1) 2 Coll., 556.
(2) 2 L. R. H. L. Cas., 149.
(3) L. R., 12 Ch. Div., 131.
(4) L. R., 24 Ch. Div., 15 and 17.

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mortgagee under one Rámchandra Dámodar, who had stolen the title-deeds from one Náthibái, the real owner of the property in question, who is now and always has been in possession. It has also been found that, just before the property was knocked down to the defendant, he was informed that Náthibái made a claim; but that he was not told, as the defendant contended he was, that there was nothing in her claim; and, lastly, that he was not told anything making the ninth condition misleading.

The question referred to us is, whether under these circumstances the defendant was bound to complete his contract of purchase having regard to the ninth condition of sale under which the property was advertised for sale, and which is in the following terms:—"The vendors shall not be bound to give any better title to the purchaser than they themselves possess, and the purchaser shall take the premises sold with such title only as the vendors can give him." This present action is, in form, to recover the residue of the purchase-money, but it is virtually one to compel specific performance, and must be governed by the principles applicable to such a suit.

Apart from any special consideration arising from the information given to the defendant at the sale, the question for determination is whether, having regard to the ninth condition of sale, the Court should compel the purchaser to complete the purchase when the vendor has no title of any sort, and not even the possession to offer to the purchaser.

In *Fremo* v. *Wright*[1], where the property of a bankrupt was sold by the assignee under a similar condition, the purchaser was compelled to take such title as the bankrupt had. But all that appears in that case is that the bankrupt had not a "good title."

However, in *Edwards* v. *Wickwar*[2], Vice-Chancellor Wood referring to *Freme* v. *Wright* says that, notwithstanding the special circumstance, in that case, of the vendor being the assignee in bankruptcy, "it has been thought a stretch of jurisdiction of the Court to force the title on the purchaser." It may doubtless be said that such a condition of sale gives the bidder notice that the

(1) 4 Madd. 364. (2) L. R., 1 Eq., 68.

vendor's title is a questionable one, and if he chooses to purchase with that knowledge, he ought to be kept to his bargain. But no purchaser reading that condition would suppose that the vendor had no claim of any sort or kind to the property, not even such *primâ-facie* title as is evidenced by possession.

In *Seaton* v. *Mapp*(1) Vice-Chancellor Knight Bruce states in admirable language the principle on which conditions of sale are to be construed. He says: "I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." Applying this principle to the present case, the purchaser is, in our opinion, entitled to say that the stipulation contained in the ninth condition implied that the vendors had some title, however defective it might be. As to the information the defendant received at the auction, it certainly gave him no notice to the contrary. The question referred to us must, therefore, be answered in the negative.

Plaintiffs in person.

Attorneys for the defendant:—Messrs. *Bálkrishna and Bhagwándás.*

(1) 2 Coll., 556, at p 562.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

1887. *April* 20.

DÁJI BIMAT, DECEASED, BY HIS SON AND HEIR, KA'SHIBA'I, FOR HIMSELF AND AS GUARDIAN OF HIS MINOR BROTHER, NATHU, (ORIGINAL DEFENDANT), APPELLANT, *v.* DHIRAJRA'M SADA'RA'M, (ORIGINAL PLAINTIFF No. 2), RESPONDENT.*

Minor—Guardian—Representative of minor in a suit against him—Certificate—Act XX of 1864—Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—Limitation for such suit—Act XV of 1877, Sec. 7 and Art. 12 - Family debt binding on minor son.

In 1862 Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji. In 1863, Rájkaran died, leaving a widow, Shivbá, and two sons, viz., Amrá and Parbhu, a minor. In 1866, Amrá and Shivbá, the latter of whom acted for herself and as guardian of her minor son Parbhu, settled the account with Bezanji, the mortgagee, obtained a fresh advance, and passed a fresh mortgage bond to him. In 1868 Amrá died. In 1869 Bezanji's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against Shivbá both as guardian of the minor Parbhu and also against her in her individual capacity. At the Court sale held in execution of this decree, Dáji purchased the property in dispute in 1870.

In 1881 Parbhu filed the present suit to recover possession of the property, alleging that Dáji's purchase was invalid as against him, he having been a minor at the time of the Court sale. He subsequently assigned his interest to the respondent, (second plaintiff). It was contended on behalf of the defendant Dáji, that the suit not having been brought within one year after Parbhu had attained majority, was barred by limitation under article 12, Schedule II, of Act XV of 1877.

Held, that the suit was not barred by limitation. Parbhu had not been properly represented by Shivbá in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX of 1864). Parbhu was, therefore, not bound by the decree in that suit, or by the sale in execution, and article 12, Schedule II, of Act XV of 1877 did not, apply.

Held, also, upon the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was, therefore, not entitled to disturb the execution-purchaser.

THIS was a second appeal from the decree of Shripad Bábáji Thákur, Acting Assistant Judge of Broach, in Appeal No. 81 of 1882.

*Second Appeal, No. 256 of 1885.

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On the 22nd May, 1862, one Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji Mákáji for Rs. 299. Rájkaran died in 1863, leaving a widow, Shivbá, and two sons, the said Amrá and Parbhu, a minor. On the 23rd June, 1866, Amrá and Shivbá, the latter of whom acted for herself and as guardian of the minor Parbhu, created a further charge upon the same property. On the 3rd September, 1867, the account with the mortgagee was settled, a fresh advance of Rs. 308 was made, and a fresh mortgage-bond for Rs. 815 was passed by Amrá and Shivbá acting for herself and as guardian of Parbhu. In 1868 Amrá died. In 1869, Bezanji assigned his interest under the mortgage-bond to one Muleshvar. Muleshvar filed a suit (No. 2114 of 1869) upon the mortgage, and obtained a decree against Parbhu, as heir of Amrá, deceased, and against Shivbá as guardian of Parbhu, and also against her in her personal capacity. The decree directed the mortgage-debt to be recovered by sale of the mortgaged property and also of any other property belonging to the judgment-debtors. In execution of this decree the property in dispute was attached and put up to auction. The defendant Dáji Himat purchased it for Rs. 1,550 on the 17th February, 1870. He obtained a certificate of sale, and got possession of the whole property.

In 1881 Parbhu filed the present suit to recover possession of the property, alleging that he was a minor at the time the defendant Dáji purchased the property at the Court sale, and that the defendant's purchase was invalid as against him. Pending the suit he assigned his interest to the second plaintiff (respondent).

The defendant pleaded (*inter alia*) that the suit was barred by limitation; that the decree, in execution of which the property was sold, was binding on the plaintiff; and that the debt, for which the decree was passed, was an ancestral debt which the plaintiff was bound to pay.

The Subordinate Judge held that the suit was not barred by limitation, having been brought within twelve years from the date of the sale; that the plaintiff was sufficiently represented by his mother, Shivba, in the suit of 1869; that the debt, for which the decree was passed, was an ancestral and family debt; and that,

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therefore, the plaintiff was bound by the decree and the sale. He accordingly rejected the plaintiff's claim.

In appeal, the acting Assistant Judge reversed the decree of the Subordinate Judge, on the ground that the plaintiff had not been properly represented by Shivbá in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX of 1864), and that, therefore, the plaintiff was not bound by the decree in that suit, and by the sale in execution. He accordingly awarded the plaintiff's claim.

Against this decision the defendant preferred a second appeal to the High Court.

Ráv Sáheb *V. J. Kirtikar* for the appellant:—The present is substantially a suit to set aside the Court sale at which the defendant purchased the property in dispute. The suit should, therefore, have been brought within one year after the plaintiff attained his majority. The case falls under article 12 of Schedule II of Act XV of 1877. The sale binds the plaintiff. The decree, in execution of which the sale was held, was passed in a suit to which the plaintiff was a party. He was a minor no doubt, but was effectively represented by his natural guardian. It was not necessary for the guardian to obtain a certificate under the Minors' Act—*Vijkor* v. *Jijibhái Vaja*[1]; *Shivbasápá* v. *Bhimá*[2]. The debt, for which the decree was passed, was a family and ancestral debt; the decree and the sale in execution are, therefore, binding on the plaintiff.

Gokuldás Káhándás for the respondent:—The mother of the minor had no authority to represent him and defend the suit on his behalf without a certificate under the Minors' Act XX of 1864—*Jathá Náik* v. *Venktápá*[3]; *Mrinamoyi Dabia* v. *Jogodishuri Dabia*[4]; *Doorga Persad* v. *Kesho Persad Singh*[5]. The decree in that suit does not bind the minor. The sale in execution, therefore, does not affect the minor's interests. We do not sue to set aside the sale, but to recover possession of immoveable property. The twelve-years' rule, therefore, applies to the present case.

(1) 9 Bom. H. C. Rep., p. 310.
(2) I. L. R., 5 Bom., 14.
(3) Printed Judgments for 1883, p. 173.
(4) I. L. R., 5 Calc., 450.
(5) L. R., 9 I. A., 27.

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NÁNÁBHÁI HARIDA'S, J.:—The facts of this case are briefly these: The property in dispute was, on the 22nd May, 1862, mortgaged by Rajkaran and his son Amrá to one Bezanji Rájkaran thereafter died, leaving a widow, Bái Shivbá, and two sons, the said Amrá and the first plaintiff, Parbhu, then a minor. On the 23rd June, 1866, Amrá and Bái Shivbá acting for herself and also as guardian of her minor son Parbhu created a further charge (exhibit B) on the same property. On the 3rd September, 1867, they settled their account with the mortgagee, and obtaining a fresh advance passed a fresh mortgage-bond (exhibit C) giving additional security. Bezanji assigned his right as such mortgagee to one Muleshwar, who in Suit No. 2114 of 1869 obtained a decree (exhibit 17) against Parbhu as the deceased Amrá's heir,—Amrá having died in the meantime,—and against Bái Shivbá as the guardian of Parbhu, and also against her in her own individual capacity. The decree directed the mortgage-debt Rs. 1,149 and costs of the suit to be realized by the sale of the mortgaged property and also from defendant's other property. In execution of this decree the property in dispute was sold and purchased by the defendant Dáji Himat for Rs. 1,550 on the 17th February, 1870. In June, 1881, or more than eleven years after, but within twelve years of such sale, Parbhu brought this suit to recover possession of such property, ignoring altogether the mortgage transactions and the decree, and alleging that the defendant had taken wrongful possession of it in 1870 whilst he was a minor. He also alleged that he had attained his majority only a year before. It is, however, found that he was "at least twenty-five years old when he instituted his suit."

The Subordinate Judge rejected his claim with costs, and this is an appeal to us against the Assistant Judge's decision reversing that decree. In the course of the argument we intimated our opinion that neither the mortgage nor the sale in execution was contrary to the provisions of the Bhágdári Act (V of 1862, Bombay), the whole of the *bhág* having formed the subject of both, as found by the lower Courts.

The only questions, therefore, which we have now to determine, are, first, whether the suit is barred by limitation, and, secondly, if

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not, whether the plaintiff is entitled to the relief he seeks, or any other?

Upon the first point it was urged that under Act XV of 1877, sec. 7 and Schedule II, article 12, the plaintiff ought to have sued within one year of his attaining majority. Whether he ought to have done so must, we think, depend upon whether he was properly represented in the suit of Muleshwar. We are of opinion he was not so represented. His mother, Bái Shivbá, was not authorized to represent him, not having obtained a certificate under the Minors' Act (XX of 1864)—*Jadhá Nátk* v. *Venktápá*[1]; *Mrinamoyi Dabia* v. *Jogodishuri Dabia*[2]; *Doorga Persad* v. *Kesho Persad Singh*[3]. His suit, therefore, was not barred under that article—*Vishnu Keshav* v. *Rámchandra Bháskar*[4].

Now, as to the merits. As he was not properly represented in the above suit, the decree in it does not bind him, and it is open to him now to show, if he can, that the debt, for which that decree was passed, and to realize which the property in dispute was sold in execution, was such as did not bind him—*Mussamut Nanomi Babuasin* v. *Modun Mohun*[5]; *Jairám Bajabáshet* v. *Jomá*[6]. But he does not even allege any such thing in this suit. The Subordinate Judge has distinctly found that the debt due to Bezanji was an ancestral and a family debt, and, therefore, one binding upon the whole family, the plaintiff included. Neither in the appeal to the Assistant Judge nor here has this finding been questioned. There is no ground to impute any fraud to his mother, who is still living with him, and who would have been called to prove, if such was the fact, that the debt was not such as to justify the sale. And his silence for nine years after he had attained his majority shows what view he himself took of the nature of that debt. The family has benefited to the full extent of the purchase-money paid by the defendant. Such being the case, we think he has entirely failed in establishing his title to disturb the execution-purchaser.

The respondent (second plaintiff) being only his assignee pending the suit stands in no better position. We must, accordingly,

(1) I. L. R., 5 Bom., 14.
(2) I. L. R., 5 Calc., 450.
(3) L. R., 9 I. A., 27.
(4) I. L. R., 11 Bom., 130.
(5) L. R., 13 I. A., 1.
(6) Printed Judgments for 1886, p. 282.

reverse the decree of the Assistant Judge, and confirm that of the Subordinate Judge. The respondent to pay the appellant's costs both in this and in the lower Appellate Court.

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Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

NA'RA'YAN CHITKO JUVEKAR, (ORIGINAL DEFENDANT), APPELLANT, *v.* VITHUL PARSHOTAM, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *April* 25.

Decree—Execution—Decree specifying a certain time for execution—Construction—Condition precedent—Limitation.

The plaintiff obtained a decree on the 25th July, 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Márgashirsha* (*i.e.*, 9th January, 1883,) and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December, 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff, having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree.

Held, that the application was not time-barred. The specification of the end of *Márgashirsh* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution.

The mention of a term when a particular right is to become enforceable, is not a condition precedent, whether the enforcement be otherwise subject to a condition or not.

SECOND appeal from the order of H. J. Parsons, District Judge of Thána, confirming the order of the Subordinate Judge of Panvel in *darkhást* No. 2153 of 1885.

The plaintiff obtained a decree, dated 25th July, 1882, which was to this effect: "The plaintiff should give the defendant possession of certain land at the end of next *Márgashirsha* (*i.e.*, 9th January, 1883); on his so doing, the defendant should remove the hedges and cowshed, and make over the land in suit to the plaintiff." On the 9th December, 1885, the plaintiff made

* Second Appeal, No. 523 of 1886.

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an application for execution of the above decree. He stated therein that he was willing to give up to the defendant the land mentioned in the decree, and he asked that the defendant should be ordered to accept it, to remove the hedges and the cowshed, and to restore the land in suit to him.

The defendant resisted this application, on the ground that it was beyond time. He contended that the plaintiff had a certain time within which to do a certain thing, and not having done it within that time, he had lost his right to execute the decree. Both the lower Courts overruled this objection, and held that the application was within time. The District Judge was of opinion that the decree fixed the end of *Márgashirsha* (9th January, 1883,) as the time when it was to come into force when the plaintiff was to hand over to the defendant the land mentioned in the decree. He, therefore, held that from the time so specified the plaintiff had three years within which he could execute the decree.

Against this decision the defendant appealed to the High Court.

Gokuldás Kahándás for the appellant:—By the terms of the decree a condition precedent is annexed to the advantage to be got by the plaintiff. Without satisfying the condition he is not entitled to the advantage. He has allowed the time fixed by the decree to pass by, and he cannot execute the decree any longer. The application is thus time-barred—*Hingan Khán* v. *Gangá Parshad*[1].

M. B. Chaubal for the respondent:—The specification of the time is not a condition precedent. It merely postpones the operation of the decree. It becomes capable of execution on the day specified—*Gureebullah Sirkár* v. *Mohun Láll Shaha*[2]; *Ugráh Nathá* v. *Laganmoni*[3]. Neither party could assert his rights under the decree before that day. Limitation, therefore, runs from the date so fixed.

WEST, J.:—The District Court in this case adjudged that the defendant should remove certain hedges and sheds by which the plaintiff was injured, but only on the plaintiff's delivering to the

(1) I. L. R., 1 All., 293. (2) I. L. R., 7 Calc., 127. (3) I. L. R., 4 All., 83.

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defendant two parcels of ground held by the former. As the land, it appears, at the time of the decree, July, 1882, was occupied with growing crops, the decree deferred the time of fulfilment by saying that "the plaintiff is to give the defendant possession, &c., at the end of next *Márgashirsha* (*i. e.*, 9th January, 1883), and on his doing this, the defendant is to remove the hedges, &c., and make over the land in suit to the plaintiff." It is now contended that the specification of the end of next *Márgashirsha* formed part of a condition precedent, and that having failed to satisfy this condition through his delay, the plaintiff has lost the contingent advantage bestowed on him by the decree, and can no longer execute it. The District Judge has understood the decree as merely fixing a time from which it was to take effect, so that the meaning was merely that nothing was to be done before the end of *Márgashirsha*. We think this is the correct view. It is not said that the plaintiff doing what he had to do on or before the end of *Márgashirsha* should then recover from the defendant. He could not demand any fulfilment by the defendant before the end of that month. Thus the operation of the decree as a command was wholly postponed until the time indicated which was thus prescribed as a term rather than as a condition[1]. There is no provision that, failing fulfilment by the plaintiff at the end of *Márgashirsha*, his right under the decree is to fail, and such an expression is what one would look for where the precise date was intended to form an essential element of the condition. As the case stands, we think that the specification of the end of *Márgashirsha* has merely the effect of making the decree speak as from that time, and that conditional as it is with respect to the step to be taken by the plaintiff, the plaintiff had three years from the 9th January, 1883, within which he might seek execution. The construction demanded by the appellant would have this consequence, that, whereas a simple order for reciprocal delivery would have allowed the plaintiff three years from July, 1882, for execution, the postponement of operation of the decree would cut down the time allowed him to six months. The case of *Sidney* v. *Vaughan*[2] shows that the men-

(1) See Ev. Poth. 88. 230, 237; Colebr. Obl., Sec. 228.
(2) 2 Bro. P. C., 254 (2nd ed.)

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tion of something to be done coupled with an expression of time may but serve to indicate a term not to impose a condition *sine quâ non*. The mention of a term when a particular right is to become enforceable is not a condition whether the enforcement be otherwise subject to a conditon or not.

We confirm the decree of the District Court with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *April* 28.

YASHVANTRA'V, (ORIGINAL OPPONENT), APPELLANT, v. KA'SHIBA'I, (ORIGINAL PETITIONER), RESPONDENT.*

Maintenance—Hindu law—Incontinence of a co-parcener's concubine disentitling her to maintenance.

Continued continence is, under the Hindu law, a condition precedent to a deceased co-parcener's concubine claiming maintenance.

APPEAL from a decision of G. Druitt, Acting Assistant Judge (F. P.) of Belgaum at Kaládgi.

The petitioner, who had been the concubine of the appellant's father, obtained a decree for maintenance against the appellant and his brother, which she now sought to execute. The appellant alleged that the petitioner had been living in prostitution, and had consequently forfeited her right to the maintenance awarded to her by the decree.

The Assistant Judge, however, ordered execution to issue. He said :—

"Opponent No. 2 is of course liable under the decree. No specific sources of income are charged with the payment of this allowance by the decree. It seems to follow, by analogy from the decision in *Párvati* v. *Bhiku*[1], that incontinence subsequent to the order awarding the allowance would not cause it to be forfeited * * * * * * * *."

* Appeal, No. 29 of 1884.

(1) 4 Bom. H. C. Rep., 25, A. C. J.

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YASHVANTRÁV v. KÁSHIBÁI.

From this order the opponent appealed to the High Court.

Ganashám Nilkanth Nádkarni for the appellant.

Shántárám Náráyan (*Shivrám Vithal Bhandárkar* with him) for the respondent.

NA'NA'BHA'I HARIDA'S, J.:—We have already, in the course of the argument, intimated our opinion that Mr. Druitt is right in holding that "no specific sources of income are charged with the payment of this allowance by the decree." Mr. Naylor, no doubt, directed that the allowance now in dispute, among others, was to be paid from certain sources of income specified by him in his report of the 13th April, 1870; but that decision was subsequently reversed by the High Court, and, on the matter being reconsidered by his successor, Mr. Baker, he came to the conclusion that "the other items," (among which the allowance in dispute is included), "should be paid from Bhujangráv's and Anná Sáheb's joint shares." See his report dated 5th August, 1872. This decision was, on the 20th August, 1873, confirmed by the High Court, and ordered to be carried out. See Miscellaneous Cross Appeals, 8 and 9, of 1870.

The only question, therefore, which remains for us to determine now is whether, according to Hindu law, Káshibái has by subsequent adultery forfeited her right to the maintenance awarded to her by the decree sought to be executed. She was a concubine of Davlatráv, who with his sons Bhujangráv and Anná Sáheb formed a joint Hindu family up to the time of his death. The Assistant Judge held that "incontinence subsequent to the order awarding the allowance would not cause it to be forfeited." But, in the case of a co-parcener's widow, unchastity subsequent to a decree declaring her right to maintenance has been held to deprive her of such right—*Vishnu Shánbhog* v. *Manjamma*[1]; *Monirám Kolita* v. *Kerry Kolitany*[2]. We have, therefore, to see whether the right of a concubine in this respect differs from that of a widow. Mr. Shivrám contends that it does. He urges that in the case of a concubine there is no express text rendering her right to maintenance conditional upon her continued chastity, as there is in the case of the widow of a co-parcener. It must be

(1) I. L. R., 9 Bom., 108. (2) L. R., 7 I. A., 151.

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observed, however, that there is no such text providing any maintenance for a concubine specially. There are texts providing generally for "women" of deceased co-parceners[1]. It is under those texts that the widows of such co-parceners are held entitled to be maintained by the survivors[2]; and they lay down the condition of continued chastity. Whether those text-writers really intended to include in the expression "women" concubines or "kept women" it is now unnecessary to speculate. It suffices for us that commentators and judicial authorities have distinctly declared that they are so included. But if they are so included, the restriction of continued chastity imposed by the texts must equally apply to them, as otherwise they would be in a more advantageous position than the widows. The wives and widows of disqualified co-parceners are entitled to maintenance, but only on condition of their continuing chaste[3]. Hence, in the absence of any authority to that effect, we are not prepared to hold that a concubine of a deceased co-parcener is entitled to be maintained by the survivors, whether she continues chaste or not.

The position of a deceased co-parcener's permanent concubine in his family is in some respects analogous, though necessarily inferior, to that of his widow not inheriting. They are both dependent members of the family, and, as such, entitled to maintenance, as above stated[4]. During the co-parcener's life-time, if not even after his death, his concubine is by the Hindu criminal law regarded as his wife, for it ordains punishment as for adultery for any sexual intercourse with her by another as if she were his wife[5], and the ceremonial law also regards her in that light, for it

(1) Texts of Kátyayana and Nárada cited in Vyav. May., Ch. IV, Sec. VIII, placita 5, 6 and 7, and in Mit. Ch. II, Sec. 1, placita 7, 27 and 28.

(2) 2 Macnaghten 112, 113; 1 Str. 171; 2 Str. 296, 295, 297, West & Bühler, H. L., 244

(3) 1 Str. 175; 2 Colob. Dig., 438. (4) 1 Str. 171, 174; 1 Norton, 48, 51.

(5) Vyav. May., Ch XIX, pl. 11; Yaju. Vyav. 290 translated in Mandlik's H. L., p. 242; Vijnaneshvara's comments on that text. Manu, Ch. VIII, 363; comments of Kulluka and Raghavananda on the text (Mandlik's ed.) untranslated. They say the punishment is ordained "on the ground of (her) being another's wife" (dara); and Viramitrodaya (Cal. ed.) 509, 510, untranslated, "on the ground of her being equal to another's wife."

declares the same length of impurity for her when he dies as for the death of a real husband[1].

These considerations certainly lend some support to the view the commentators have taken that the term "women" in the texts above referred to does include concubines. When competent public opinion, as reflected in the writings of the commentators, allots to the concubine a position similar to that of a wife, and when it assigns to her maintenance as to a wife, it is only fair to the family, bound to provide for her, and whose reputation is necessarily affected by the conduct of every member of it, that her right to such maintenance should be subject to the same restriction as the right of the wife. And, accordingly, we find it declared by the Shástri, in a case so far back as 1847, that the mother of an illegitimate son, *if well behaved*, is entitled to maintenance[2]. It would be strange, however, if this condition of good behaviour attached to a concubine only when she had children.

For these reasons, we must hold that continued continence is a condition precedent to a deceased co-parcener's concubine claiming maintenance. It was urged by the appellant that Káshibái had, since the decree in her favour, left the family house and was living as a prostitute. This allegation was not inquired into by the lower Court under the erroneous view it took of the law on the subject. We must, therefore, reverse its decision, and remand the case for decision on the merits. Parties to be at liberty to give additional evidence on the above point. The costs of this appeal to abide the result.

(1) Nirnaya Sindhu Ashauch, 11 (2) 1 West & Bühler, 582.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. June 23.

MAHANT ISHWARGAR, (ORIGINAL DEFENDANT), APPLICANT, *v.* CHUDASAMA MANA'BHAI AND OTHERS, (ORIGINAL PLAINTIFFS), OPPONENTS.*

Civil Procedure Code (Act XIV) of 1882, Secs. 2, 244 and 617—Decree—Stay of execution—Amount of security required on granting stay of execution a question in execution and order thereon appealable.

The defendant in a redemption suit, against whom a decree had been passed, appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court under section 617 of the Civil Procedure Code (Act XIV) of 1882.

Held, that no reference would lie under section 617 of the Civil Procedure Code. The question as to the amount of the security was a question relating to execution as contemplated by section 244 of the Code, and, therefore, an order determining that question would be appealable under Section 2 of the Code.

THIS was a reference by Khán Bahádur Burjorji Edalji Modi, First Class Subordinate Judge of Ahmedabad, under section 617 of the Civil Procedure Code (Act XIV) of 1882.

In a redemption suit by the plaintiffs, a decree was passed holding the property redeemable on payment of a certain amount. The decree was appealed against by the defendant to the High Court, which granted a stay of execution on security being given by the defendant The Subordinate Judge, feeling doubt as to which of the two amounts—*viz.*, (1) that stated in the plaint or the (2) actual value of the property—was to form the basis for the security, referred the question to the High Court under section 617 of the Civil Procedure Code (Act XIV) of 1882.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the defendant:—This is a question in an execution proceeding, and cannot be referred under section 617 of the Civil Procedure Code. Any order passed by the lower Court in this matter would be appeal

* Civil Reference, No. 15 of 1887.

able—*Gházidin* v. *Fakir Bakhsh*(1); *Udeyadeta Deb* v. *Gregson*(2); *Luchmeeput* v. *Sitá Náth*(3); *Rangjí* v. *Bháiji*(4).

1887.

MAHANT ISHWARGAR v. CHUDASAMA MANABHAI.

Ganpat Sadáshiv Ráo, contra:—This is not a reference under section 617 of the Civil Procedure Code. The lower Court wants a mere direction of the High Court as to the taking of security ordered by this Court. Even assuming that it is a reference under section 617, still the lower Court should be considered as proceeding under section 545, and any order that may be passed under that section is not appealable under section 588 of the Code. A reference, therefore, will lie, such an order being final.

SARGENT, C. J.:—The question as to the amount of security to be given by the defendant as the condition of the stay of execution of the decree against him was a question now "relating to execution" within the contemplation of section 244 of the Civil Procedure Code, and, therefore, an order determining that question would be appealable under section 2 of the Civil Procedure Code—*Gházidin* v. *Fakir Bakhsh*(5); *Udeyadeta Deb* v. *Gregson*(6). No reference, therefore, lies to this Court under section 617, even assuming that section to apply to a proceeding of this nature under section 647. Plaintiffs to pay defendant his costs.

(1) I. L. R., 7 All., 73.
(2) I. L. R., 12 Calc., 624.
(3) I. L. R., 8 Calc., 477.
(4) I. L. R., 11 Bom., 57
(5) I. L. R., 7 All., 73.
(6) I. L. R., 12 Calc., 624.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

RA'MPRATA'P, PLAINTIFF, v. GANESH RANGNA'TH, DEFENDANT.*

1887. June 27.

Jurisdiction—Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XIV) of 1882, Sec. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice.

In a suit brought by the plaintiff to recover Rs. 36-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court,

Held, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.

* Civil Reference, No. 4 of 1887.

1887.

RÁMPRATÁP v. GANESH RANGNÁTH.

THIS was a reference by Ráv Sáheb Karpurrám Manmathrám, Subordinate Judge of Panvel, under section 617 of the Civil Procedure Code (Act XIV) of 1882.

The plaintiff sued to recover from the defendant Rs. 33-7-9, being the price of two cases of clarified butter bought by the defendant on the 6th April, 1886; Re. 1-12 as interest thereon at the rate of 12 annas *per cent. per mensem*; and Rs. 1-3-6, the cost of a notice given to the defendant. The defendant entered his appearance, and put in a written statement admitting the claim, but claiming a set-off of Rs. 75.

The Subordinate Judge referred the following question to the High Court for its opinion:—

Whether a defendant has a right to set off a sum exceeding Rs. 50 in a suit which is within the Small Cause Court jurisdiction of his Court?

The Subordinate Judge's opinion on the point was in the negative.

Ghanashám Nilkanth Nádkarni for the plaintiff:—The set-off claimed by the defendant exceeds the pecuniary jurisdiction of the Subordinate Judge as a Small Cause Judge, and he cannot try the question of set-off. If the defendant proved his set-off, the effect would be the same as if he obtained a decree: see clause 3 of section 111 of the Code. But the Small Cause Court jurisdiction of the Subordinate Judge is limited to Rs 50; therefore, the set-off can only be proved to that amount.

Vásudev Gopál Bhandárkar for the defendant:—The Subordinate Judge, who has been invested with Small Cause Court powers, exercises two separate jurisdictions: first, that of a Small Cause Court Judge; second, that of a Subordinate Judge—*Bálkrishna* v. *Lakshman*[1]. Under the first he can try the claim of the plaintiff, and under the second he can try the set-off of the defendant.

SARGENT, C. J.:—We think there is no objection to the Subordinate Judge trying the set-off pleaded by the defendant. He is not the Judge of two Courts, but has two jurisdictions—*Malhári*

(1) I. L. R., 3 Bom., 219.

v *Narso Krishna*[1]—and will exercise his Small Cause Court jurisdiction in trying the claim made by the plaint and his ordinary jurisdiction in trying the set-off, and as he is governed by the Code of Civil Procedure in his procedure—*Bhagván Dayáji* v. *Bálu*[2]—he will set off the one debt against the other as provided by section 111.

1887.

RÁMPRATAP v. GANESH RANCHÁTH.

(1) I L R, 9 Bom, 174 (2) I. L. R., 8 Bom, 231.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt, Chief Justice, and Mr Justice Nánábhái Haridás

GOVINDRA'V AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* RA'VJI AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1887. *July* 5.

Mortgage—Subsequent assignment of the equity of redemption by the mortgagor—No notice to mortgagee of such assignment—No change of name in Collector's books—Further advances by mortgagee to original mortgagor on same security—Suit by assignee of equity of redemption to redeem—Liability of assignee to pay off the further advances to mortgagor—Standing by—Allowing original mortgagor's name to remain in Collector's books.

In order to complete an assignment of an equitable estate in immoveable property it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate Nor is there any rule of Hindu law which requires notice to be given to the person in possession whose position may be considered analogous to the holder of the legal estate in English law.

By a registered mortgage-deed, P in 1860 mortgaged certain property with possession to the defendants. In 1871, P. sold his equity of redemption to the plaintiffs, who allowed it to remain in P.'s name on the Collector's register Subsequently, in 1873, the defendants made further advances to P. on the security of the same mortgaged property. The plaintiffs sued to redeem. The Court of first instance rejected the plaintiffs' claim, being of opinion that their purchase was not proved. On appeal, the District Judge reversed the decree, holding that the sale to the plaintiffs was proved He held, further, that the plaintiffs could not redeem without paying off the further advance made by the defendants in 1873, on the ground that the plaintiffs had given no notice of their purchase to the defendants, and had allowed Pándoji's name to remain on the Collector's register as the ostensible owner.

The plaintiffs appealed to the High Court.

Held, that the plaintiffs' title as assignees of the equity of redemption was complete, although no notice of the assignment had been given to the defendants

* Interlocutory judgment in Appeal, No. 200 of 1885.

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But, although such notice was not necessary to complete the plaintiffs' title, it was plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by and allowing the defendants to make further advances to Pándoji under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in Pándoji's name in the Collector's books, the allowing it so to remain after the assignment would be sufficient for the purpose.

THIS was a second appeal from a decision of E. T. Candy, District Judge of Ratnágiri.

In 1869 one Pándoji by a registered deed mortgaged the property in dispute to the defendants with possession, and in 1871 he sold his equity of redemption to the plaintiffs, who omitted to get it transferred to their name on the Collector's register.

In 1873, Pándoji obtained from the defendants further advances on the security of the same property.

The plaintiffs brought the present suit to redeem the property from the defendants.

The defendants impeached the sale to the plaintiffs as fraudulent, and contended that the plaintiffs were not entitled to redeem.

The Court of first instance held the alleged sale to the plaintiffs not proved, and rejected their claim.

The plaintiffs appealed to the District Judge, who held the sale proved, and reversed the lower Court's decree, with the following remarks :—

" * * * The fact is, Pándoji, having no son of his own, was very willing in 1871 to sell his birth-right to his nephews (plaintiffs) for Rs. 45. They allowed him to remain the nominal owner and he recklessly borrowed further sums on the property, but they have every right now to redeem it. The next question is, what sum is due to the defendants? Plaintiffs' *vakíl* admits the sum due on the registered bond of 1869; but he wishes to avoid the debt of 1873. This, I think, his clients cannot do, as they did not give notice of the transfer of the equity of redemption, and allowed Pándoji to remain as the ostensible owner * * * *"

The plaintiffs preferred an appeal to the High Court.

Mánekshán Jehángirshán for the appellants :—The lower appellate Court was wrong in considering a notice to the defendants

of the plaintiffs' purchase to be necessary. In adding the advances made by the defendants subsequently to the sale of the equity of redemption to the plaintiffs the lower Court has applied the principle of tacking which has been held not to apply to India—*Náráyan Venkoba* v. *Pándurang Kamat*(1). See, also, Act IV of 1882, sec. 2. The plaintiffs should be allowed to redeem on payment of the original debt only.

Dáji Abáji Khare for the respondents :—The defendants have been in possession and as against the plaintiffs have the legal estate in them. The defendants, therefore, have a better title than that of the plaintiffs, who have only an equitable assignment—*Thorndike* v. *Hunt*(2). The conduct of the plaintiffs amounts to negligence. The defendants were allowed to remain in possession, and had no knowledge of the plaintiffs' purchase when the second advance was made. The plaintiffs must suffer for their neglect—*Rice* v. *Rice*(3).

SARGENT, C. J. :—The facts of the case as found by the District Judge are that the defendants are the mortgagees under Pándoji by registered mortgage of 1869 ; and that they afterwards made further advances to Pándoji on the same security in 1873. In the meantime, however, Pándoji had sold his equity of redemption to the plaintiffs in 1871. The District Judge held that as the plaintiffs had not given notice to the defendants of their assignment, they could not redeem the property, except on condition of paying the debt of 1873 as well as that of 1869. We do not feel sure whether the District Judge intended to hold that notice to the mortgagee in possession was necessary to complete the plaintiffs' title as assignees of the equity of redemption. By English law it is clear that the assignment of an equitable estate in immoveable property is complete without notice to the owner of the legal estate—*Wilmot* v. *Pike*(4), where the owner of the legal estate was the first mortgagee, as in the present case. Nor are we aware of any rule of Hindu law which requires us to hold differently as regards the necessity of notice to the person in possession whose position may be considered analogous to the holder of the

(1) I. L. R., 7 Bom., 526.
(2) 3 De G. & Jo., 563.
(3) 2 Drew, Rep , 73.
(4) 5 Hare's Rep., p. 14.

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legal estate in English law. But, although notice to the defendants was not, we think, necessary to complete the plaintiffs' title as assignees of the equity of redemption, it is plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by, and allowing the defendants to make further advances to Pándoji, under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in Pándoji's name in the Collector's books, the allowing it so to remain after the assignment would, in our opinion, be sufficient for the purpose. We must, therefore, send back the case for a finding on the following issues :—

1. Was the property standing in the name of Pándoji in the Collector's books when the assignment was made to the plaintiffs, and, if so, did it continue to stand in his name when the further advances were made by the defendants ?

2. Were the plaintiffs aware of the negotiation for the further advances by the defendants to their uncle Pándoji in 1873 ?

The findings to be returned to this Court within two months. Parties to be allowed to give fresh evidence.

CRIMINAL REFERENCE.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *July* 14.

QUEEN-EMPRESS *v.* TULJA' AND OTHERS.*

Sanction to prosecute—Criminal Procedure Code (Act X of 1882), Sec. 195—Sub-Registrar—Forgery—Indian Penal Code (Act XLV of 1860), Secs. 463, 467—Court—Judicial inquiry—Administrative inquiry.

A Sub-Registrar under the Registration Act (III of 1877) is not a Judge, and, therefore, not a 'Court' within the meaning of section 195 of the Code of Criminal Procedure (Act X of 1882). His sanction is, therefore, not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office.

The ruling in *In re Venkatdchala* (1) dissented from.

The word 'Forgery' is used as a general term in section 463 of the Indian Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in section 195 of the Criminal Procedure Code (Act X of 1882) so as to embrace all species of forgery, and thus includes a case falling under section 467 of the Indian Penal Code.

* Criminal Reference, No. 72 of 1887.

(1) I. L. R., 10 Mad., 154.

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The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope.

Distinction between a *judicial* and an *administrative* inquiry pointed out.

THIS was a reference by S. Tágore, Sessions Judge of Sholápur, under section 215 of the Criminal Procedure Code (Act X of 1882).

The accused Tuljá and four others were charged, under section 467 of the Indian Penal Code, with the forgery of a will purporting to be made by one Rádhá, deceased. On the 11th January, 1887, Tuljá presented the will in question to the Sub-Registrar for registration under Act III of 1877. On the 15th of the same month, the complaint in the present case was lodged before the First Class Magistrate of Sholápur. It was contended, on behalf of the accused Tuljá, both during the preliminary inquiry before the committing Magistrate and at the trial in the Court of Sessions, that the Sub-Registrar, acting under section 41 of Act III of 1877, was a 'Court' within the meaning of section 195 of the Criminal Procedure Code (Act X of 1882), and that, therefore, his sanction to prosecute the accused was necessary. In support of this contention the ruling in *In re Venkatáchala* (1) was relied upon.

On this point the Assistant Sessions Judge made the following remarks :—

"This question, so far as the Bombay High Court is concerned, is clear of any judicial authority. The point is not very simple, and is, in my opinion, sufficiently important to be carefully noticed. Part VIII of the Registration Act relates to the 'presenting wills and authorities to adopt.' A Sub-Registrar is authorised by section 40 to accept the presentation of wills by persons claiming under them. Under section 41 the Sub-Registrar is authorized to satisfy himself as to (1) the due execution of them by the testators, (2) the death of the testators, and (3) the right of the persons presenting them to present them for registration. In the absence of any decision of the Bombay High Court on the point, it is, I think, proper for this Court to follow the Madras decision quoted by his pleader for the accused. The Madras High Court have held that 'a Sub-Registrar is legally authorised to take evidence under Part VIII of the Indian Registration Act for the purpose of satisfying himself upon certain points, and he is, therefore, when acting under section 41 of Act III of 1877 a 'Court' within the meaning of the Indian Evidence Act. So far, therefore, as any action of the Sub-Registrar under

(1) I. L. R., 10 Mad., 154.

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section 41 is concerned, there can be no doubt that he has the power to issue sanction to prosecute, and, therefore, the absence of it is fatal to the trial. But I do not think that there are sufficient grounds for restricting the scope of section 195 of the Criminal Procedure Code to action of the Sub-Registrar under section 41 of Act III of 1877 only. If section 41 covers the issue in a case of this kind, I submit that section 40 also ought to cover it. The point for consideration is, therefore, narrowed to this: whether presentation of a will to a Sub-Registrar is a stop of the proceeding in the Sub-Registrar's Court. I am strongly of opinion that it is. If the Sub-Registrar's enquiry under Part VIII is of such an exceptional kind as to make it necessary to clothe it with the rights and obligations flowing from a proceeding of a Court, I think that the reason of the case requires that the presentation of the will which commences the proceeding ought to be treated as a part of the proceeding. The fact of presentation of a will is next in importance to that of the person entitled to present it as forming a part of the enquiry under section 4. It would be highly improper to hold that for the purpose of accepting the presentation of a will the Sub-Registrar is no Court, but only when he takes the next step of enquiring into the matters of section 41 he acts as a 'Court', when as a matter of fact, his *caput* or *persona* of a Court is brought into existence by the very presentation of the will. Then, again, it seems to me subversive of all judicial and administrative principles to suppose that any person can defeat the object for which sanctions to prosecute have been instituted as conditions precedent, for a Sub-Registrar may or may not take steps under section 41 on the same day that he accepts presentation of a will under section 40. But if he postpones the enquiry under section 41, any person by lodging a complaint of forgery may deprive the accused of the right to sanction from the Sub-Registrar if he on any enquiry thinks that the will is forged, or the protection of the refusal to sanction if the Sub Registrar is satisfied that the will was genuine. If an action of that kind is allowable as based upon good law, then I have not the least hesitation in saying that the sooner it is amended the better it is for public morals or safety. For analogy take the case of a civil suit. If a plaint is based upon an alleged forged will, and presented to the Court, the Criminal Courts cannot take action in respect of the said will until the Civil Court issues any sanction to prosecute. That if it is alleged that before the Civil Court takes evidence the Criminal Courts are not estopped from taking the criminal action in the matter, the argument would be spouted as monstrous. It was urged by the Public Prosecutor that in a civil suit the proceedings commence with the presentation of the plaint. Just so, in any matter the first action of the party is the commencement of the proceeding; and although the Registration Act does not expressly provide that the proceedings under it commence from the presentation of documents, yet it could not be otherwise than that, simply because all the administrative functions of the Sub-Registrar as an officer or a Court under the Act are called into play from the date and fact of presentation of a document. A presentation cannot be withdrawn. Even a deficit stamp duties can be enforced by the Sub-Registrar. There cannot, therefore, be the least doubt that the proceeding before the Sub-Registrar as a Court under Part VIII or as an officer under any other part of the Act commences from the presentation of a document, and includes that Act. If so, it

follows that the Magistrate had no jurisdiction to try or enquire into the complaint without the sanction of the Sub-Registrar. He ought to have waited to see what the Sub-Registrar was doing. Accepting, therefore, the correctness of the Madras ruling, I think that this committal must be held to have been without jurisdiction.

"The Public Prosecutor drew my attention to *Juggut Chunder* v. *Kasi Chunder*(1), and argued that no sanction was necessary on account of simple presentation of a will before the Sub-Registrar. But that case does not, in any way, support the position taken by the learned pleader. In that case, the suit was settled without any evidence being gone into. The High Court of Calcutta held that under the circumstances the Court could not form a correct judgment of the *bona fides* of the claim, and could not properly issue any sanction for giving false evidence, and more especially as the application, which commenced the proceedings, did not require verification, though it was verified. But in the present case there is nothing of this kind. It is for the Sub-Registrar to see whether he should or should not issue sanction, and not the criminal Courts to question the legality of it. This case has nothing bearing upon the point at issue.

"It is quite clear that accused No. 1 was only the party to the proceeding before the Sub-Registrar, because she presented the will. The other accused were no parties, and, therefore, their committal is good at law in so far as they are concerned.

"The second argument of the Public Prosecutor, being the one chiefly relied upon by the committing Magistrate, does not appear to me to be sound.

"The document is, no doubt, the subject of the proceeding before the Sub-Registrar, but the proceeding is different from the document. Here is what the Madras High Court say at page 186 of the judgment cited by the pleader for the accused:—'As the document has been given in evidence before him in a proceeding in which the Sub-Registrar had to determine whether the document should or should not be registered, it appears to us that his sanction is necessary to the enquiry."

The reference was argued before West and Birdwood, JJ., on the 14th July, 1887.

Hon Ráv Sáheb *V. N. Mandlik* for the Crown:—The complaint in this case is under section 467 of the Penal Code. For a prosecution under that section no sanction is necessary.

Ganpat Sadáshiv Ráo for the complainant:—A Sub-Registrar acting under section 41 of the Registration Act (III of 1877) is not a 'Court' within the meaning of section 195 of the Code of Criminal Procedure (Act X of 1882). Section 195 is to be read with section 476 of the Code. The latter section specifies the Courts which are competent to deal with contempt cases. Section

(1) I. L. R., 6 Calc., 440.

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483 of the Code enables a local Government to make a Sub-Registrar a Civil Court in certain cases of contempt. He is, therefore, not a Civil Court in other cases. Section 75 of Act III of 1877 shows that even the Registrar when hearing an appeal against the order of a Sub-Registrar refusing registration, is not a Court, but is to be deemed "as if he were a Court." The functions assigned to the Registrar and the Sub-Registrar in the matter of registering documents are purely administrative, and not judicial. Neither the Registrar nor the Sub-Registrar adjudicates upon the rights of the parties to a document tendered for registration. Neither of the two is, therefore, a Judge or a Court. The definition of a "Court" given in the Evidence Act (I of 1872) is confined to the purposes of that Act. In *Queen Empress* v. *Bharmá* [1] a Full Bench of this Court held that a Magistrate taking down a statement under section 164 of Act X of 1882 is not a Court. So, too, in *Queen Empress* v. *Ismáil*[2] it was held that a police officer recording a statement under section 161 of Act X of 1882 is not a Court. It follows, therefore, that every officer whose duty it is to record evidence is not a Court. The Madras High Court has, no doubt, held in *In re Venkatáchala*[3] that a Sub-Registrar acting under section 41 of Act III of 1877 is a Court. But that case, even if correct, is distinguishable from the present in this respect, that the Sub-Registrar has taken no action in the present case under section 41 of Act III of 1877.

R. G. Mundle for the accused :—Section 195 of Act X of 1882 applies to offences described by section 463 of the Penal Code. The offence of forging a will is an offence described in section 463. The Evidence Act defines a Court so as to include all persons legally taking evidence. A Sub-Registrar is a public officer empowered by law to take evidence under section 41 of Act III of 1877. His proceedings are judicial under section 228 of the Penal Code. His Court is a Court as defined by the Evidence Act—*In re Sardharee Lál*[4]. In the present case he has acted under section 41 of Act III of 1877. The case of *In re Venkatáchala*[5] is, therefore, on all fours with the present case.

(1) L. R., 11 Bom., 702.
(2) L. R., 11 Bom., 659.
(3) I. L. R., 10 Mad., 154.
(4) 22 Calc. W. R., Cr. Rul., 10.
(5) I. L. R., 10 Mad., 154.

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WEST, J. :—This is a reference by the Sessions Judge of Sholápur under section 215 of the Criminal Procedure Code (Act X of 1882).

The question for decision is, whether a Sub-Registrar for the purposes of the present case is to be regarded as a Judge, and the proceedings held before him as judicial proceedings in a Court, so that no prosecution for forgery can proceed without his sanction in respect of a forged document presented for registration in his office?

It might have materially assisted the Court if the Sessions Judge, instead of adopting the somewhat superficial reasoning of the Assistant Sessions Judge, had entered on an independent investigation of the question from the standpoint of his own wider knowledge and riper experience.

The expression forgery is used as a general term in section 463 of the Indian Penal Code, and that section is referred to in a comprehensive sense in section 195 of the Criminal Procedure Code, so as to embrace all the species of forgery afterwards provided for as to punishment, and this includes a case falling under section 467 of the Indian Penal Code.

Therefore, if the Sub-Registrar is a Court, and the document was presented to him as to a Court, then his sanction is undoubtedly required for the prosecution of the accused Tuljá, under sections 109 and 467 of the Indian Penal Code (Act XLV of 1860).

The question, therefore, is, whether the Sub-Registrar is, or is not, a Court. It appears to us that some confusion has arisen in the mind of the Assistant Judge between a judicial and an administrative inquiry. An inquiry or trial under the Code of Criminal Procedure, in which evidence is legally taken, is for the purposes of the Code included in the term "judicial proceeding." But this does not involve the consequence that other inquiries are judicial proceedings, and that the functionaries holding them are judges or Courts.

In the case of *The Queen* v. *Price*[1] Blackburn, J., says :—"Where the common law or the legislature has cast on a person the

(1) L. R., 6 Q. B., at p. 418.

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obligation, where certain facts exist, not to form his opinion or exercise a discretion, but to do a certain thing, then, no doubt, there is a preliminary inquiry whether those facts exist, and no doubt the person called upon to perform the obligation must, to some extent, exercise common sense, and see whether the facts do exist." But this, as the learned Judge shows, is quite different from a judicial inquiry. It is the object to which an inquiry is pointed that determines the nature of it. A policeman before he arrests a person often has to make an inquiry, but is not, therefore, a judge—*Queen Empress* v. *Ismal* (1). An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially. *Forbes* v. *Ameeroonissa Begum*(2) affords an instance of non-judicial functions being ascribed to a judge. The Sub-Registrar has not to determine the jural relations between parties arising out of the documents presented for registration. He merely makes an inquiry to satisfy himself whether he is justified in registering the document presented for that purpose. The Registrar, also, in determining whether a document should be registered or not, on an appeal being preferred against the decision of the Sub-Registrar on that point, even if he takes evidence, does so, not as a Court, but under section 75 of Act III of 1877 "as if he were a Court." His inquiry is analogous to one by the Registrar of this Court as to whether a clerk or other subordinate has done his duty properly. No judicial function is exercised. Although it appears, from section 483 of the Criminal Procedure Code, that the Local Government may constitute a Sub-Registrar a Court for the purposes of certain sections, as those dealing with contumacious contempts, still, from the fact of that section being deemed necessary, it is to be implied that he is not to be considered a Court for ordinary purposes. A provision that a particular officer may, for particular purposes, be deemed a Court, does not warrant an extension of that provision so as by inference to produce a group of rules in conflict with the general system. A provision such as that contained in section 483 of the Criminal Procedure Code is an excres-

(1) I. L. R., 11 Bom., 659. (2) 10 M. I. A., 340.

cence on the general system, and exceptional provisions are not to be drawn out into all their logical consequences. "*Quod contra rationem juris recipitur non producendum est ad consequentica.*"

If the Sub-Registrar is anomalously regarded as a judge for particular purposes, that does not constitute him a judge for other purposes. It is opposed to the general principles of jurisprudence to build a system on an exception; or, as Burke has put it, "it is against all genuine principles of jurisprudence to draw a principle from a law made in a special case." Nor is the general law altered or controlled by partial legislation made without special reference to it—*Denton* v. *Lord John Manners*(1). This principle was recently applied in the case of *Jivan Bhaga* v. *Hirá Bháiji*(2). The same principle has been several times applied to the Dekkhan Agriculturists' Relief Act in its relations to the general law.

The present case has been put before us very imperfectly, but it is clear that the Sub-Registrar did not enter into any inquiry at all. Even in making an inquiry it would not be proper to declare him a judge on the strength of the definition of Court given in the Evidence Act, as that definition is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope—*Attorney General* v. *Moore*(3). Special laws must be confined in their operation to their special object. An exception to a rule must not be permitted to absorb the rule.

The Sub-Registrar not being for general purposes a Court, he does not become one by making an inquiry for the purpose of ascertaining whether he is justified in registering a document presented for registration, much less is he a judge when not even making an inquiry. Nor do the provisions in the Code of Criminal Procedure as to cases of contempt before a Registrar constitute that officer a judge or Court for general purposes.

We are of opinion, therefore, that the sanction of the Sub-Registrar is in no way necessary for the prosecution of the accused Tuljá. The commitment was legal; and we direct that the Sessions Court do receive the commitment and proceed with the trial.

Trial ordered.

(1) 27 L. J. Ch., pp. 190 and 623. (2) Printed Judgments for 1887, p. 201.
(3) L. R., 3 Ex. Div., 276.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *July* 21.

RANGO JAIRA'M, PLAINTIFF, *v.* BA'LKRISHNA VITHAL, DEFENDANT.*

Jurisdiction—Decree—Execution—Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Practice—Procedure.

The plaintiff having obtained a decree against the defendant in the Court at Bhusával, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusával and Nágpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusával Court to the defendant's disbursing officer at Nágpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusával Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusával. On reference to the High Court,

Held, that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusával Court. The proper procedure was to send the decree of the Bhusával Court for execution to Nágpur, where the disbursing officer resided, and the defendant's pay was available or satisfaction of the decree.

THIS was a reference by Ráv Sáheb Dwárkanáth Náráyan Ranadive, Subordinate Judge of Bhusával, under section 617 of the Civil Procedure Code (Act XIV) of 1882. The reference was as follows:—

"In this case the plaintiff applied to the Second Class Subordinate Judge at Bhusával, in execution of his decree against the defendant, who is described as an inhabitant of Bhusával, and consequently within the jurisdiction of his Court, and who is a sorter in the Railway Mail Service, for an order to the defendant's disbursing officer to attach and send to the Court a moiety of the defendant's pay. The order was sent, and had been obeyed.

"The defendant, however, appeared on the 27th March, 1887, and applied for the withdrawal of the order attaching his pay, on the ground that it was illegal, inasmuch as the Court had no authority to issue the order, because he dwelt at Nágpur, and not in Bhusával, as stated by the plaintiff in his application, and that as neither he nor the disbursing office, from which he receives his pay, is

* Civil Reference, No. 20 of 1887.

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within the local jurisdiction of the Court, the Court could not attach his pay."

The question referred by the Subordinate Judge for the High Court's decision was:—

Whether, under the circumstances, the defendant could not be considered as having a temporary lodging at Bhusával?

The Subordinate Judge's opinion on the point was in the affirmative.

Vishnu Krishna Bhátavadekar for the plaintiff.

Vásudev Gopál Bhándárkar, for the defendant, relied on the case of *Gopál* v. *T. H. Lavet*[1].

SARGENT, C.J.:—As neither the disbursing officer nor the judgment-debtor himself lives within the local jurisdiction of the Court, the salary of the judgment-debtor can in no sense be said to be within the jurisdiction, and cannot, therefore, be attached. A copy of the decree may be sent to Nágpur for execution, where the disbursing officer resides, and the judgment-debtor has pay available for the satisfaction of the decree.

(1) See *infra*.

Note.—The following is the case of *Gopál* v. *T. H. Lavet*, (Printed Judgments for 1883, p. 169,) referred to in the argument. The case was heard by West and Nánábhái Haridás, JJ.

The plaintiff Gopál, having obtained in the Court of the Subordinate Judge of Bhusával a decree against the defendant Lavet, applied in execution of that decree to attach a moiety of the defendant's pay. The defendant was employed on the Málwa and Rájputána Railway. An order having been sent to the Agent of the Railway, it was returned unexecuted, on the ground that the Bhusával Court had no jurisdiction. The Subordinate Judge of Bhusával referred the following questions to the High Court:—

Whether a Court passing a decree could by a prohibitory order attach the pay of a judgment-debtor when the officer disbursing the pay had his office beyond the local jurisdiction of that Court, and also when the debtor was for the time being employed in a place beyond its jurisdiction?

2. Whether the order for attaching the pay could only be served by sending it direct to the pay disbursing officer, or whether it could be sent for service to the Court having jurisdiction in the place in which his office was located

WEST, J.:—There is not any provision in the Code of Civil Procedure enabling the Subordinate Judge to exercise authority and issue orders and execution to a disbursing officer residing without his local jurisdiction, in order to obtain

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satisfaction of a decree against a judgment-debtor, who also is beyond his local jurisdiction. A copy of the decree may be sent to a Court having local jurisdiction, and that Court may execute it in one of the ways allowed by the Code of Civil Procedure if either the judgment-debtor resides within its local jurisdiction or if he has assets, including pay, available there for the satisfaction of the decree.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. July 7.

MAHOMED HUSEIN, PLAINTIFF, *v.* RA'DHI, DEFENDANT.*

Civil Procedure Code (Act XIV) of 1882, Sec. 349—Court, power of, to release judgment-debtor after he is imprisoned—"Arrest" and "imprisonment."

"Arrest", as used in section 349 of the Civil Procedure Code (Act XIV) of 1882, does not include "imprisonment." Therefore the power conferred on the Court, under that section, to release a judgment-debtor arrested in execution of a decree on security being given by him, ceases after he has been imprisoned or put into jail.

In the matter of William Hastie (1) dissented from.

In re Quarme (2) followed.

REFERENCE by Ráv Bahádur K. C. Bedárkar, Acting Judge of the Court of Small Causes, Poona, under section 617 of the Civil Procedure Code (Act XIV) of 1882. The reference was as follows :—

"In this case the defendant Rádhi was arrested and brought up before the Court under section 336 of the Code of Civil Procedure in execution of the decree passed against her in favour of the plaintiff, Mahomad Huseif. Under the provisions of that section she was informed by the Court that she might apply, under Chapter XX of the Code, to be declared an insolvent, and that she would be discharged if she had not committed any act of bad faith regarding the subject of her application. The defendant did not express her intention to make such an application, and was committed to jail.

"Subsequently, she from jail made an application, under section 344, to be declared an insolvent, and prayed under section 349 to

* Civil Reference, No. 19 of 1887.

(1) I. L. R., 11 Calc., 451. (2) I. L. R., 8 Mad., 503.

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be released from jail on furnishing sufficient security that she would appear when called upon."

The question referred by the Small Cause Court Judge for the High Court's decision was:—

Whether her prayer for release could be complied with?

The Small Cause Court Judge's opinion was in the negative.

Dáji Abáji Khare for the applicant:—The applicant can apply to be released on furnishing security. She did not lose the right by reason of being in jail at the time she applied. No doubt the words used in sections 344, 349 of the Civil Procedure Code (Act XIV) of 1882, are "arrest" and "imprisonment." See *In the matter of William Hastie*(1).

Náráyan Ganesh Chandávarkar for the decree-holder:—When the applicant was committed to jail she lost the right to be released under section 349 of the Code. The terms "arrest" and "imprisonment" are distinguished in the case of *In the matter of Ruttonsi Kaliánji*(2). When a judgment-debtor is once put into jail it is the right of the judgment-creditor to have him detained there. Section 341 of the Code expressly provides for the release of the debtor in certain cases only. The maxim *expressio unius est exclusio alterius*, therefore, is applicable. The Code does not allow *interim* release of the debtor when he has been put into jail, except as provided by section 341. *Hastie's case*(3) has put a wrong interpretation on the terms "arrest" and "imprisonment," and the interpretation of this Court should be upheld. Section 345 says that in the application the debtor shall state whether he is "arrested" or "imprisoned:" so this shows that the intention of the Legislature was that the two terms should be distinguishable, and the right, which the debtor has to apply upon arrest, is lost when he is imprisoned. See also *In re Quarme*(4).

SARGENT, C.J.:—The circumstance that throughout the Code the terms "arrest" and "imprisonment" are employed as denoting different things, and, further, that in sections 344 and 345 both "arrest" and "imprisonment" are mentioned where the

(1) I. L. R., 11 Calc., 451.
(2) I. L. R., 2 Bom., at pp. 159 and 182.
(3) I. L. R., 11 Calc., 457.
(4) I. L. R., 8 Mad., 503.

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provisions of the sections are intended to apply in either case, precludes, we think, the larger construction that has been placed by the Calcutta High Court, *In the matter of William Hastie* (1), upon the term "arrest" in section 349.

Had the Legislature intended to give the judge the power of releasing the judgment-debtor when in jail, we should have expected to find "imprisonment" mentioned as well as "arrest," as is done in the above sections. The decision *In re Quarme* (2) supports the construction of the section. The question referred to us is answered in that sense.

(1) I. L. R., 11 Calc., 451. (2) I. L. R., 8 Mad., 503.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

KRISHNA'JI JANA'RDAN, (ORIGINAL PLAINTIFF), APPELLANT, v. MURRA'RRA'V AND NARSINGRA'V, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation—Joint family—Death of judgment-debtor—Execution—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice.

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative.

Accordingly where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June, 1881, under a *darkhást* No. 718 of 1878, against V., one of the three sons of the debtor, and the execution proceedings continued till the death of V. in March, 1884, whereupon the plaintiff applied on the 28th May, 1884, to put M. and N., the brothers of V., on the record as his representatives,

Held, that the application was not too late against M. and N. regarded as joint representatives with their brother V. of their father, the original judgment-debtor.

THIS was a second appeal from a decision of A. C. Watt, Acting District Judge of Poona.

The appellant, Krishnáji, obtained a decree against one Yashvantráv, who died leaving three sons, *viz.*, Vithalráv and the respondents Murrárráv and Narsingráv, who after his death continued

* Appeal No. 691 of 1885.

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to live as members of an undivided family. On the 18th June, 1881, Krishnáji presented *darkhást* No. 718 of 1878, and obtained an order for execution of his decree against Vithalráv alone, and the execution proceedings continued until Vithalráv's death in March, 1884. On the 28th May, 1884, the appellant applied to put Murrárráv and Narsingráv on the record as representatives of their deceased brother, Vithalráv. Notice having been served upon them under section 248 of the Civil Procedure Code (Act XIV) of 1882, they denied their liability as representatives of their brother, and contended that they were full owners of the property.

The Joint Subordinate Judge of Poona rejected the appellant's application.

The appellant appealed to the District Judge, who confirmed the lower Court's order, with the following remarks:—

"* * * I certainly think they (Murrárráv and Narsingráv) were not heirs of Vithalráv. As brothers, they were joint coparceners, and if the plaintiff wished in execution to get any order binding on them, he most certainly should have made them parties on the record. They were as necessary parties to the *darkhást* of 1878 as Vithalráv was, and no order passed in any proceeding to which they were not parties is binding on them * * * * * *."

The appellant preferred a second appeal to the High Court.

Shántárám Náráyan for the appellant:—Vithalráv was the eldest son of the original debtor, and execution having been issued out against him it should be considered as issued against his brothers. Execution against one representative is execution against the other: see *Rám Anuj Sewak Singh* v. *Hingu Lál*[1].

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the respondents:—The respondents ought to have been made parties to the proceedings taken against their brother, Vithalráv. They are not Vithalráv's representatives. They are now the sole owners of the property.

July 7th. SARGENT, C. J.:—The Acting Judge would appear to have treated the application as one to place Murárráv and Narsing-

(1) I. L. R., 3 All., 517.

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rár on the record for the purpose of executing the decree against them. In holding that they were not the heirs or representatives of Vithalrár he was clearly right, but he proceeds to consider whether they could now be placed on the record as heirs of Yashvantrár, or otherwise we do not understand how the question of limitation could arise. He says, and rightly, that they were every bit as much as Vithalrár necessary parties to the *darkhást* of 1878, and concludes that not having been made parties it is now too late to proceed against them. We agree, however, with the ruling in *Rám Anuj Sewak Singh* v. *Hingu Lál*(1) that the application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. The application would not, therefore, be too late as against Murrárrár and Narsingrár regarded as joint representatives with Vithalrár of the original judgment-debtor, Yashvantrár.

We must, therefore, discharge the order, and send back the case for a fresh decision, having regard to the third issue, which is to be understood as including the question whether the mortgage was valid beyond Yashvantrár's life-time, and, if so, whether it was for a legitimate purpose so as to bind his sons. Costs to abide the result.

(1) I. L. R., 3 All., 517.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE BOMBAY UNITED MERCHANTS' COMPANY, LIMITED, (PLAINTIFFS,) *v.* DOOLUBRA'M SA'KULCHAND AND PURSHOTAM JA'VER, (DEFENDANTS).*

Contract—Sale of goods—Non-acceptance of goods—Contract for goods to be ordered from Europe—Such contract not fulfilled by offer of goods of same description not ordered out for purchasers, but bought by vendors in Bombay.

On the 7th August the defendants commissioned the plaintiffs to order out from Europe 500 cwts. copper braziers, September shipment, assorted in the manner set out in the indent signed by the defendants, "free on board, Bombay harbour," at the rate of £ 53-5 *per* ton. On the same day the plaintiffs sent a reply to the defendants' order in their usual form, partly lithographed and partly written, as

* Sma Cause Court Suit, No. 3819 of 1887.

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follows —"We have the pleasure to inform you that we have received a telegram from our Manchester friends and so far as the cypher is therein used we learn that they advise the following purchases which will be invoiced to you at your limit, subject to confirmation by letter as usual Order this day 100 bundles of copper braziers at £ 59 5 *per* ton, free on board Bombay" As a fact, however, no telegram had been received from the plaintiffs Manchester friends, and the plaintiffs had not learned that they had advised the purchases referred to in their reply The acceptance of the plaintiffs offer was really based on the plaintiffs view of the probabilities of the copper market The agents in England were unable to carry out the order, and it remained unexecuted On the 26th October the plaintiffs having negotiated with one Naga Ducha to take over from him a September shipment of copper by the S S. *Merton Hall*, answering to the defendants' order, and for the purpose of fulfilling it wrote to the defendants as follows — "We beg to inform you of the arrival of the S S *Merton Hall* with 100 packages of goods sold to you as *per* agreement No 213, and have therefore to request payment of the cash for those goods, according to the terms of the agreement" The plaintiffs negotiation, however, with Naga Ducha fell through, and they were unable to supply the defendants with the goods from the *Merton Hall*. The defendants on the 30th October wrote through their solicitors to the plaintiffs, stating that they believed the goods never came to Bombay, and that they considered the contract at an end The plaintiffs, however on the 29th October had succeeded in purchasing a September shipment of goods from one Beg Mahomed corresponding to those ordered by the defendants They then on the 31st October wrote to the defendants informing them that it was a mistake of their clerk to advise the arrival of the defendants' goods *per Merton Hall*, and handing the defendants invoice of 100 bundles arrived *ex Tuban Head* The defendants discovered that the plaintiffs had not ordered out these goods, but had purchased them in Bombay and on that ground they refused to accept them The price of copper had then fallen The plaintiffs sold the goods by auction, and brought this suit against the defendants, to recover the difference between the price realized by the sale and the price which by their contract the defendants had agreed to pay It was admitted by the plaintiffs witnesses that it was intended, at the time the defendants gave their order, that the goods should be ordered out from England by the plaintiffs, and that this was the invariable course of business of the plaintiffs firm—the present case forming the only instance to the contrary

Held, that the defendants were not bound to accept the goods offered by the plaintiffs, and that the plaintiffs were not entitled to recover the amount sued for

An importing firm which accepts a commission to order out goods at a fixed rate, and undertakes that they shall be invoiced to the person giving the order at that rate, does not, (in the absence of proof of usage to the contrary), fulfil his contract by obtaining goods, answering to the terms of the order, from another firm in Bombay, and tendering them to the person giving the order

IN this suit which was originally brought in the Small Cause Court of Bombay the plaintiffs on the 13th June 1887, obtained

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a decree against the defendants for Rs. 2,000 and costs. On the 20th June, 1887, the defendants filed a petition for a rehearing of the case by the High Court, under section 38 of the Presidency Small Cause Court Act XV of 1882. On the 15th June, 1887, an order for rehearing was made by the High Court.

The suit was brought by the plaintiffs to recover damages sustained by them by reason of the defendants not taking delivery of certain copper braziers which had been ordered by them under an indent dated the 7th August, 1885.

The defendants were general merchants in Bombay, and had been in the habit of ordering out goods from England through the plaintiffs' firm. On the 7th August, 1885, the second defendant commissioned the plaintiffs to order from England, on account of his firm, one hundred bundles—equal to 500 cwts.—of copper braziers, at the price of £53-5 *per* ton, free on board, deliverable in Bombay harbour. He signed an indent, which was in the following form :—

"*Bombay, 7th August 1885.*

"$\frac{\text{I}}{\text{We}}$ hereby commission the United Merchants' Company, Limited, to order for $\frac{\text{my}}{\text{our}}$ account and risk the following goods from Europe, to be shipped as soon as possible by any steamer, and subject to the following conditions. Any dispute as to quality or condition of the goods or any dispute whatsoever is to be referred to the arbitration of two European merchants—one to be chosen by the indentor and one by the United Merchants' Company, Limited, on behalf of their manufacturer or agents, and their decision shall be binding upon both parties, whether they decide upon an allowance to the indentor or the total or partial rejection of the goods or otherwise.

"The prices mentioned are for goods, f. o. b., Bombay harbour, cash, and $\frac{\text{I}}{\text{we}}$ further agree to pay all charges for packing, forwarding, and shipping, as also for freight and insurance, which must be covered payable in Bombay or London above the full invoice amount.

"The United Merchants' Company, Limited, or their agents can draw upon me/us at..... days' sight at the current rate of exchange for the full invoice amount, and I/we herewith bind myself/ourselves to accept such draft on presentation and to pay it at maturity against delivery of the documents relating to such shipments, or, if required, by payment at current rate of exchange of the day by bank bill as usual.

"All risk of the voyage are for my/our account.

"I/We hereby agree to accept whole or any part of the order that may be practicable.

"In case of the order transmitted by wire the United Merchants' Company, Limited, do not hold themselves responsible for any mistake on the part of telegraph officials.

"Commission, *nil*.

"Shipment, September next.

"100 bundles, each weighing about 5 cwts.

"500 cwts. copper braziers assortment.

"Bombay harbour.

(Signed) PURSHOTAM JAVER,
for Doolubrám Sákulchand."

On the same or following day the defendants received from the plaintiffs the following letter, stating that their indent had been duly accepted:—

"*Bombay, 7th August 1885.*

"To DOOLUBRÁM SÁKULCHAND, Esq.

"We have the pleasure to inform you that we have received a telegram from our Manchester friends, and so far as regards the cyphers therein used, we learn that they advise the following purchases, which will be invoiced to you at your limit.

"Subject to confirmation by letter as usual.

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"Order this day (100) one hundred bundles of copper braziers, at £53-5 *per* ton, f. o. b., Bombay.

(Signed) F. D. PANDAY & Co.,
Agents."

On the 26th October, 1885, the defendants received from the plaintiffs the following notice of the arrival of the goods in Bombay:—

"*Bombay, 26th October 1885.*

"To DOOLUBRÁM SAKULCHAND, Esq.

"Dear Sir,—We beg to inform you of the arrival of the S. S. *Merton Hall*, with 100 packages of goods sold to you as *per* agreement No. 213, and have, therefore, to request payment of the cash for these goods, according to term of the agreement

"Our friends are requested to note that, in the event of goods invoiced in English price, the amount will be converted in Indian currency bearing interest at 9 *per cent. per annum* at the rate of exchange ruling on the second mail day after the arrival of the steamer.

"100 bundles of copper sheets.

Yours truly,
(Signed) F. D PANDAY Co.,
Agents."

It appeared, however, that the plaintiffs' agents in Manchester had not executed the defendants' order, and had not sent them any goods to Bombay. The plaintiffs had accordingly negotiated with one Naga Ducha to take over from him a September shipment of copper by the S. S *Merton Hall*, answering to the defendants' order; and believing they would thus be able to supply the required goods to the defendants, they wrote the above letter. The plaintiffs' negotiation, however, with Naga Ducha fell through, and they were unable to get the goods from the *Merton Hall*. The defendants on the 30th October, 1885, through their attorney wrote the following letter, stating that they considered the contract to be at an end:—

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"To THE UNITED MERCHANTS' COMPANY, LIMITED.

"Sirs,—I have been instructed by my client, Mr. Doolubrám Sákulchand, that in the month of August last he ordered out, through you, 100 bundles of copper braziers, at £53-5 *per* ton, to be shipped in September. That, by a letter dated the 7th August last, you intimated to him that you had received a telegram from your Manchester friends that the said purchase will be invoiced to him at his limit, subject to confirmation as usual. That no such letter was ever received by him. That by a letter dated the 26th instant you advised him that his goods had arrived by the S. S. *Merton Hall*. That since the receipt of the said letter my client often called upon you for the invoice of the said goods and also tendered you the purchase-money, but you put him off from time to time under various pretexts. My client, therefore, concludes, from your aforesaid conduct, that his goods never came to Bombay, and he instructs me to give you this notice that he no longer considers himself bound by his aforesaid contract.

"Dated this 30th day of October 1885.

Yours truly,

(Signed) KHANDERÁV MOROJI,
Solicitor, High Court."

The plaintiffs, however, on the 29th October had succeeded in purchasing a September shipment of goods from one Beg Mahomed, *ex Tuban Head*, corresponding to those ordered by the defendants, and on the 31st October, 1885, they wrote the following letter to the defendants:—

"*Bombay, 31st October 1885.*

"To KHANDERÁV MOROJI, Esq.,

Solicitor, High Court,

Bombay.

"Dear Sir,—Your letter addressed to us on behalf of your client, Mr. Doolubrám Sákulchand, with reference to the 100 bundles of copper sheets purchased by him as *per* agreement dated 7th August last, was only received by us late yesterday evening. In reply, we beg to inform you that it was a mistake of our clerk to advise the arrival of the goods *per Merton Hall*.

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"Enclosed we beg to hand you invoice of 100 bundles arrived *ex Tuban Head*, weighing lbs. 252,119, as *per* specification attached, amounting to lbs. 1,337-13-10, for which we request payment in terms of the agreement made by your client.

(Signed) F. D. PANDAY & Co.,
Agents."

The price of copper had then fallen, and the defendants having discovered that the plaintiffs had not ordered out these goods, but had purchased them in Bombay, refused to accept them.

On the 3rd November, 1885, the plaintiffs wrote the following letter:—

"*Bombay, 3rd November 1885.*

"To KHANDERÁV MOROJI, Esq.,
Solicitor, High Court,
Bombay.

"Dear Sir,—We are in receipt of your letter of yesterday. The real contract, as was perfectly well understood between the parties, was for the sale, by the company which we represent, to your client of the goods in question of September shipment. The reference in the printed form of the agreement signed by your client to the goods being ordered through our company from our Manchester agents was, to the knowledge of the parties, a mere surplusage, and no part of the actual contract, as is evidenced, among other things, by the fact that at your client's desire we signed and handed to him on the spot, and simultaneously with the execution of the contract paper by your client, the usual printed form purporting to be an intimation to the intended purchaser of the receipt of telegraphic advice by us from Manchester of the goods contracted for having been purchased; and this formality, which on any other supposition is not only unnecessary, but absolutely unmeaning, was gone through, as your client wished to have a voucher evidencing the formation of the contract. Under the circumstances of the case we were only bound, and have already repeatedly offered, to deliver to your client goods of the kind stipulated for, and of September shipment, but your client, who obviously thinks it convenient to ignore the receipt of the said printed form signed by us, wishes to get out of the

contract owing to a fall in the market, but we will hold him to the contract, and beg to give him this final notice through you, that, unless the goods offered by us are all taken delivery of, and paid for, within twenty-four hours after the receipt hereof by you, we will resell the same on his account and at his risk, and hold him liable for all the loss and deficiency that may arise thereby.

Yours faithfully,
(Signed) F. D. PANDAY & Co.,
Agents."

The plaintiffs subsequently sold the copper braziers, which they had offered to the defendants, by public auction; and having realized considerably less than the contract price they brought this suit in the Small Cause Court against the defendants for the balance, and obtained a verdict for Rs. 2,000 and costs.

The case now came on for rehearing before Farran, J.

Lang for the plaintiffs.

Macpherson and *Jardine* for the defendants.

FARRAN, J.:—The facts in this case, except in details which appear to me of but little importance, are not really in dispute. The plaintiffs are a company whose business is to receive indents in Bombay, order out goods from Europe to fulfil such indents, and deliver such goods to the indentors in Bombay. The defendants for some time prior to the transaction in question dealt with the plaintiffs' company On the 7th August, 1885, the defendant signed one of the plaintiffs' usual indent forms, by which he commissioned the plaintiffs to order for their account from Europe, to be shipped as soon as possible by any steamer and subject to certain printed conditions, the following goods:—100 bundles, each weighing about 5 cwts.—equal to 500 cwts.—copper braziers, assorted in a certain manner set out in the indent, at £53-5 *per* ton, free on board, Bombay harbour. The first condition provided for the reference of any disputes as to quality or condition of the goods to arbitration. The next related to the payment, which was to be in cash for goods, free on board, Bombay harbour. The latter portion of it, which provides for the payment of ship-

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ping charges, &c., by the defendants, must be rejected as inconsistent with the rest of the order. The next is as follows:—"The United Merchants' Company, Limited, or their agents, can draw upon me at..... days' sight at the current rate of exchange for the full invoice amount, and I herewith bind myself to accept such draft on presentation and to pay it at maturity against delivery of the documents relating to such shipments, or, if required, by payment at current rate of exchange of the day by bank bill as usual." The alternative mode of payment is in writing. This fact and the number of the days' sight being left blank shows that it was intended that payment in this case was to be in cash Then comes—"All risks of the voyage are for my account." Then—"I hereby agree to accept the whole or any part of the order that may be practicable." Then—"In case of the order being transmitted by wire, the United Merchants' Company, Limited, do not hold themselves responsible for any mistake on the part of telegraph officials." Then—"Commission *nil*." Lastly, "Shipment, September next."

Before accepting such an indent as the above, it is usual for the plaintiffs' company to telegraph to their agents in England to ascertain whether the order can be carried out at the rate proposed. This was not done in the present case, as the defendant did not wish the delay or expense of a telegram, but desired the company either to accept the order at once or refuse it. The company departed from their usual practice, because Carramchand Cullianji, one of the directors, expressed his willingness to take the risk upon himself. The order was, in fact, accepted by the company on his account and at his risk This, however, did not affect the defendant, or alter his legal position in reference to the company. As far as the defendant was concerned, he commissioned the plaintiffs to order out for him 500 cwts copper braziers, September shipment, and agreed to accept the whole 500 cwts. and pay for them in cash at the rate of £53-5 per ton, free on board, Bombay harbour, on their arrival.

On the same day the plaintiffs gave or sent to the defendant a reply, in their usual form, to his order, partly lithographed and partly written, as follows:—"Bombay, 7th August, 1885. The

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United Merchants' Company, Limited, to Doolubrám Sákulchand, Esq. We have the pleasure to inform you that we have received a telegram from our Manchester friends, and so far as regards the cyphers therein used, we learn that they advise the following purchases, which will be invoiced to you at your limit, subject to confirmation by letter as usual .—Order this day 100 bundles of copper braziers at £53-5 *per* ton, free on board, Bombay." This reply, from the word "order" to the end, is written. That word and the portion preceding it are lithographed. As a fact, however, no telegram had been received from the plaintiffs' Manchester friends, and the plaintiffs had not learnt that they had advised the purchases referred to in their reply. This was probably known to the defendant as well as to the plaintiffs It was suggested that the telegram referred to in the reply might relate to a prior offer which the plaintiffs had received by telegram about a fortnight before, and which they had not accepted, but the suggestion appears to me to be without foundation. The acceptance of the defendant's offer was really based on Carramchand's view of the probabilities of the copper market.

As I have stated above, the usual course of the plaintiffs' sending a telegram and waiting for a reply before accepting the defendant's order was not adhered to, as Carramchand took the risk as well as the possible profit of the order upon himself. That circumstance, it seems to me, cannot alter the legal effect of the plaintiffs' reply in the same way, as it did not affect the legal results flowing from the defendant's order. The plaintiffs are in the same position exactly as if the usual course had been pursued. The defendant's order, as summarised above, is accepted by the plaintiffs thus :—The goods you have ordered will be invoiced to you at your limit, namely 100 bundles of copper braziers at £53-5 *per* ton, free on board, Bombay. The reasons which induced the plaintiffs to accept the order seem to me to be quite immaterial, whether it was the receipt of a telegram assuring them that the order could be carried out at the defendant's limit, or the fact that Carramchand's undertaking placed them in the same safe position as if such a telegram had been received. The plaintiffs, in consideration of the defendant's order and the undertakings contained in it, promise the defendant that the goods

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ordered by him will be invoiced to him at the agreed rate. That acceptance or promise is in the same lithographed terms as the plaintiffs use in accepting and promising to fulfil all similar orders, and is, it seems to me, attended with the same legal consequences. I find nothing in the oral evidence which prevents me from giving effect to the contract between the plaintiffs and the defendant evidenced by the written agreement. The evidence of the plaintiffs' agent is that Carramchand directed him to draw out the usual form.

On the 11th August, 1885, the plaintiffs wrote to their Manchester agents to send them the goods which the plaintiffs had ordered at £53-5 *per* ton. This indent the plaintiffs cancelled by telegram early in September, reducing their limit by 5*s. per* ton. The agents were unable to carry out the order at the reduced limit, and it remained unexecuted. On the 26th October, the plaintiffs through Carramchand had negotiated with one Naga Ducha to take over from him a September shipment of copper by the *Merton Hall*, answering to the defendant's order, and for the purpose of fulfilling it; so they wrote on that day to the defendant as follows:—"We beg to inform you of the arrival of the S.S. *Merton Hall* with 100 packages of goods sold to you as *per* agreement No. 213, and have, therefore, to request payment of the cash for those goods, according to the terms of the agreement." The negotiation with Naga Ducha fell through, and the defendant, therefore, could not get the goods from the *Merton Hall*. He, on the 30th October, wrote through his solicitors to the plaintiffs, stating that he believed the goods never came to Bombay, and he considered the contract to be at an end. The plaintiffs on the 29th October had succeeded in purchasing, through Carramchand, a September shipment of goods from Beg Mahomed, corresponding to those ordered by the defendant. They then on the 31st October wrote to the defendant, informing him that it was a mistake of their clerk to advise the arrival of the defendant's goods *per Merton Hall*, and handing the defendant invoice of 100 bundles arrived *ex Tuban Head*. The defendant found out that the plaintiffs had not ordered out those goods, but purchased them in Bombay, and he repudiated them on that ground. The price of copper had then fallen. The plaintiffs

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sold the goods by auction, and now sue for the difference in price between that realised and that which the defendant had contracted to pay.

The question is, whether, under the circumstances, they are entitled to recover it. That question is one of general importance. It amounts to this. When a firm, like the plaintiffs, accept a commission to order out goods from Europe at a specified rate, and undertake that the goods will be invoiced to the indentor at that rate, do they fulfil their contract by offering to their indentor goods which they have procured in Bombay from another house answering the description of the goods ordered through them? It appears to me that the custom of the trade, if there be one, ought properly to be invited to solve that question (see *Johnson* v. *Raylton*[1].) No evidence of any custom has, however, been adduced, and I must, therefore, decide it upon principle. It is admitted by the plaintiffs' witnesses that it was intended, at the time when the defendant gave his order, that the goods should be ordered out from England by the plaintiffs, and that this was the invariable course of business of the plaintiffs' firm, the present case forming the only instance to the contrary. The plaintiffs usually have the goods they order out invoiced to themselves, and when they receive such invoice, they re-invoice them to the persons for whom they order out the goods. In the case of copper braziers the goods do not bear any distinctive marks, showing that they have been imported through the plaintiffs. The only mark on them is the shipping mark on the outer sheet of each bundle, which varies according to the pleasure of the agent who ships the goods. There does not appear to be any particular advantage in having the copper selected by the plaintiffs' agents. In fact, in the case of copper braziers, it does not appear to make any difference to the indentor whether they are imported by the firm from or through whom he obtains the goods or not. In the case of goods of other descriptions, there may be, and no doubt is, an advantage, real or supposed, in ordering them out by a particular firm.

The construction of the contract cannot, however, vary according to the goods to which it is applied. The importance of the

(1) L. R., 7 Q. B. Div., 438.

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stipulation is really immaterial. The sole question is, is it a term of the contract that the plaintiffs shall order out the goods? Can this be really doubted? The proposal is that the plaintiffs shall order out the goods to be paid for at a certain rate. The acceptance is an undertaking that the goods shall be invoiced to the defendant at that rate. That, in my opinion, means that the goods shall be ordered out and invoiced to the defendant at that rate; otherwise it would be an acceptance of it, with a modification which, until the modification was itself assented to, would not constitute a contract. The case of *Johnson* v. *Raylton*(1) is important as showing that, if it can be gathered expressly or impliedly from an order for goods and its acceptance that the goods are to be of the manufacture of the person accepting the order, the latter will not fulfil his contract by supplying goods in all respects answering to the description contained in the order if they are not of his own manufacture. Upon that point there was no difference of opinion between Lord Bramwell and his colleagues. Their difference of opinion consisted in this. Was a stipulation that the goods were to be manufactured by the plaintiff to be implied into the contract without evidence of custom? Lords Justices Cotton and Brett thought that it was. Lord Bramwell thought not. To use the words of Brett, L. J., in that case—"It seems to me to be more consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles, to say" that an importing firm which accepts a commission to order out goods at a fixed rate, and undertakes that they shall be invoiced to the person giving the order at that rate, does not fulfil his contract by obtaining goods answering to the terms of the order from another firm in Bombay and tendering them to the person giving the order than (in the absence of evidence of usage) to say the contrary that this is so through the practical effect of an order like the present, when accepted, is to constitute the relation of vendor and purchaser between the parties. As to the legal relation which such a contract creates, see *Ireland* v. *Livingston*(2). I have already pointed out that it was the admitted intention of the parties that the defendant's order

(1) L. R., 7 Q. B. Div., 438, at p. 454. (2) 5 H. L., 395.

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should be carried out in England in the usual manner. The terms of the plaintiffs' letter (written under the instructions of Carramchand) offering the defendant goods *ex Merton Hall* and *ex Tuban Head* in fulfilment of his order, indicate, I think, an intention on the plaintiffs' part to conceal from the defendant the fact that they had not themselves ordered out the goods. Their present contention is for the first time set up in their letter of the 3rd November, 1885.

It is to be regretted that the law in this case does not allow of an appeal from my decision, as it involves a question of importance. I dismiss the suit with costs, including costs of application for new hearing.

Attorneys for the plaintiffs :—Messrs. *Bamanji and Hormasji.*
Attorney for the defendant :—Mr. *Khanderáv Moroji.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

IN *RE* PREMCHAND DOWLATRA'M.*

1887.
February 9.

Civil Procedure Code (Act XIV of 1882), Sec. 174—Production of document—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Indian Penal Code (Act XLV of 1860), Sec. 175—Criminal Procedure Code (Act X of 1882), Sec 480.

A witness was summoned to produce a document in Court in connection with a certain suit He attended the Court, but did not produce the document, stating on oath that it was not in his possession. But this statement was disbelieved, and the Court fined him Rs 75, under section 174 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the fine was illegally levied The jurisdiction of the Court to punish under section 174 of the Civil Procedure Code exists only in the case of a witness, who, not having attended on summons, has been arrested and brought before the Court

The case of a witness who having a document will not produce it, is provided for by section 175 of the Indian Penal Code (Act XLV of 1860) and section 480 of the Code of Criminal Procedure (Act X of 1882).

Where a witness denies, on oath, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

* Application under Extraordinary Jurisdiction, No. 62 of 1886.

1887.

IN RE PREMCHAND DOWLATRÁM.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The applicant, Premchand Dowlatrám, was summoned to produce certain books of account in Suit No. 1382 of 1885 pending in the Small Causes Court at Ahmedabad. He attended the Court in obedience to the summons, but did not produce the books required, stating on oath, as an excuse, that they were in the possession of his partner, who refused to part with them. The Court disbelieved this statement, and fined him Rs. 75, under section 174 of the Civil Procedure Code.

Thereupon Premchand filed the present application, under the extraordinary jurisdiction of the High Court, praying for a reversal of the lower Court's order, on the ground that it was illegal and *ultra vires*.

The High Court granted a rule *nisi*, calling upon the Judge of the Small Cause Court to show cause why the order should not be set aside or varied.

Govardhan M. Tripate for the applicant.

WEST, J.:—In this case the Judge of the Small Cause Court at Ahmedabad has fined the applicant Rs. 75 for not producing a document which he had been summoned to produce. The applicant came to the Court, but then stated on oath that he had not the document, and could not produce it. Thereupon the Judge disbelieving this statement fined him ostensibly under the provisions of section 174 of the Code of Civil Procedure. A careful perusal of that section, however, shows that the present case did not fall within it. The jurisdiction to punish under the enactment exists only in the case of a witness, who, not having attended on summons, has been arrested and brought before the Court. The case of a witness who, having a document, will not produce it, is provided for by section 175 of the Indian Penal Code, and a limited summary jurisdiction is given to the Court in such a case by section 480 of the Code of Criminal Procedure (X of 1882). The mere provision of this mode of procedure by the Legislature implies that another and different one is not intended to be followed; and if the Judge of the Small Cause Court could fine a witness attending his Court under section 174

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IN RE PREMCHAND DOWLATRAM.

of the Code of Civil Procedure, he would deprive him of the appeal given by the law against a similar decision under section 480 of the Code of Criminal Procedure. Where a witness denies, on oath, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

We reverse the order as made without jurisdiction, and direct that the fine paid by the applicant be restored to him.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887.
March 23

LAKSHMIBAI BA'PUJI OKA, (ORIGINAL APPLICANT), APPELLANT, *v.* MA'DHAVRA'V BA'PUJI OKA AND OTHERS, (ORIGINAL OPPONENTS), RESPONDENTS.*

Decree—Execution—Maintenance—Decree for payment of an annuity without specifying date of payment—Default in paying such annuity—Enforcement of payment by execution of decree—Limitation—Computation of time.

A Hindu widow obtained a decree dated 7th September, 1865, directing that a sum of Rs. 36 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, and recovered three years' arrears. In 1885 payments having again fallen into arrear, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application

Held, that the application was not time barred The decree created a periodically recurring right Though no precise date was specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court.

Sakhárám Dikshit v. *Ganesh Sáthe*(1) followed.

Subbanatha Dikshatar v. *Subbá Lakshmi Ammal*(2) and *Yusufkhán* v. *Sirdár Khán*(3) distinguished.

* Second Appeal, No. 112 of 1886.

(1) I. L. R , 3 Bom., 193 (2) I. L. R., 7 Mad., 80.

(3) I L. R., 7 Mad , 83.

1887.

LAKSHMIBÁI BÁPUJI OKA v. MÁDHAVRÁV BÁPUJI OKA.

THIS was a second appeal from the order of Q. B. Izon, District Judge of Ratnágiri, confirming the order of Ráv Sáheb P. B. Gádgil, Second Class Subordinate Judge of Chiplún, in *darkhást* No. 703 of 1885.

One Lakshmibái, widow of Náráyan Bápuji Oka, obtained a decree, dated 7th September, 1865, directing certain property to be delivered up to her for her maintenance, or else a sum of Rs. 36 to be paid to her every year for the same purpose. The judgment-debtors did not assign the property to the widow, but paid the annuity till 1878. In August, 1881, the widow applied for execution of the decree, and recovered three years' arrears of maintenance. The payment having again fallen into arrear, the present application for execution was made. It was dated 6th June, 1885. It was rejected by the Subordinate Judge as barred by limitation, more than three years having elapsed since the last preceding application. This order was confirmed, on appeal, by the District Judge.

Thereupon the decree-holder presented a second appeal to the High Court

Dáji Abáji Khare for the appellant.—The decree in the present case is to be construed in the same way as a decree ordering payment by instalments or payment of an annuity. Such a decree comes into operation on the day on which such instalment or annuity becomes due. Limitation should, therefore, be computed from that date—*Sakhárám Dikshit* v. *Ganesh Sátho*[1]; *Lakshman Rámchandra Joshi* v. *Satyabhámábái*[2]; *Vishnu Shámbhog* v. *Manyamma*[3].

There was no appearance for the respondents.

WEST, J.:—In the present case a decree, dated 7th September, 1865, ordered the delivery of property to the plaintiff, a widow, for her maintenance, or else payment to her of Rs. 36 a year for the same purpose. The property was not delivered, but the annuity was paid for some years, when a default occurred, the widow sought and obtained execution through the Court for three years' arrears due in August, 1881.

(1) I. L. R., 3 Bom., 193 (2) I. L. R., 2 Bom., 494.
(3) I. L. R., 9 Bom., 108.

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The application, with which we have now to deal, was made on the 6th June, 1885. The District Court has agreed with the Subordinate Judge in holding the application was barred by limitation as having been made more than three years after the last preceding application under the same decree. For this decision the Courts rely on the cases *Sabhanatha Dikshatar* v. *Subbá Lakshmi Amma*l(1), *Yusufkhán* v. *Sirdár Khán*(2); but it is to be observed that the former of these cases turned rather on the circumstance that the decree sought to be executed was declaratory only as to the future right, not a command to satisfy it by specified payments. The distinction is important as indicated by the cases *Lakshman Rámchandra Joshi* v. *Satyabhámábái*(3); *Vishnu Shámbhog* v. *Manjamma*(4). A Court in executing a decree cannot itself make a new decree. It can only give effect to a positive command, and dispose of such questions as arise incidentally in giving effect to it In the present case there was a positive alternative command by the Court, that the defendant should pay the plaintiff Rs. 36 a year, and such a decree would, we think, be subject to the principle laid down in *Sakhárám Dikshit* v. *Ganesh Sáthe*(5). There is no precise date specified for payment of the annuity, and this, according to one of the Madras cases, would be an important circumstance against the judgment-creditor, but construing the decree, as it ought to be construed, most favourably to him on whom it bore, we must say that he became liable to pay Rs. 36 on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. If this were not so, the judgment-debtor, by paying regularly for three years, and so intercepting an application to the Court, could escape payment for ever afterwards. The right to execute accruing on a particular day, limitation is, we think, to be computed from that day, should the judgment-debtor fail to obey the order of the Court. Should he omit to pay, he may,

(1) I. L. R., 7 Mad., 80
(2) I. L. R., 7 Mad., 83.
(3) I. L. R., 2 Bom., 494
(4) I. L. R., 9 Bom., 106.
(5) I. L. R., 3 Bom., 193

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as to the particular sum, have the benefit of limitation where that comes in to protect him.

We reverse the decrees below, with costs throughout on the respondents, who are to pay the annuity claimed for each time of payment falling within three years of the application.

Decree reversed

APPELLATE CIVIL.

Before Mr. Justice West and Mr Justice Birdwood.

1887 *March 29.*

PA'RVATIBAI BY HER AGENT SADA'SHIV B. SA'THE', (ORIGINAL PLAINTIFF), APPELLANT, v. VINA'YEK PA'NDURANG AND OTHERS, (ORIGINAL DEFENDANTS) RESPONDENTS.*

Recognized agent—Civil Procedure Code (Act XIV of 1882), Sec. 37—Agent's right to execute decree obtained by him as agent—Waiver—Execution of decree.

P. filed a suit in the Second Class Subordinate Judge's Court at Mahád. As P. resided at Thána, outside the jurisdiction of the Court of Mahád, she authorized her agent, under a general power of attorney, to conduct the suit on her behalf The agent carried on the litigation up to the final decree passed by the High Court on appeal in P.'s favour The agent then sought to execute the decree. The Court at Mahád passed an order upon his *darkhást* granting only partial execution Against this order the agent filed an appeal in the District Court at Thána Then, for the first time, the judgment-debtors challenged the agent's right to represent P., who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed.

Held, that the agent could not be prevented from executing the decree which he had obtained as agent No objection had been taken to the agent's right to represent P. at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation

THIS was a second appeal from the decree of Ráv Bahádur Chunilál Mánecklál, First Class Subordinate Judge of Thána with appellate powers, in Appeal No. 445 of 1885.

One Párvatibái brought a suit in the Court of the Second Class Subordinate Judge at Mahád to recover certain property Párvatibái was a resident of Thána, outside the territorial jurisdic-

* Second Appeal, No. 358 of

tion of the Court at Mahád. She, therefore, authorized her agent, Sadáshiv Balvant Sáthé, under a general power of attorney to conduct the suit on her behalf. The suit was dismissed by the Court of first instance. Thereupon the agent preferred an appeal to the District Court at Thána. No objection was taken to the agent's representing Párvatibái in appeal, though she was residing within the local limits of the District Court's jurisdiction. The District Court reversed the decree of the Subordinate Judge, and awarded Párvatibái's claim. Against this decision there was a second appeal to the High Court. In this Court also Párvatibái was represented by her agent, Sáthé. The High Court dismissed the appeal, and the decree in favour of Párvatibái was confirmed.

Thereupon the agent applied for execution of the decree. The Subordinate Judge at Mahád ordered delivery of possession of only a portion of the land adjudged to Párvatibái. The agent then appealed against that order to the District Court, and the District Judge sent the appeal for trial to the Court of the First Class Subordinate Judge with appellate powers at Thána. In that Court the judgment-debtors objected to the agent's right to represent Párvatibái, on the ground that Párvatibái was living within the Court's jurisdiction This objection was allowed, and the appeal was dismissed. The Subordinate Judge recorded the following reasons :—

"Párvatibái has been residing within the limits of the District Court at Thána, and that being so, her agent has no *locus standi* in that Court. The agent cannot appear for her, and cannot prefer an appeal on her behalf. So far as the Subordinate Judge's Court at Mahád was concerned, the agent has a *locus standi*. The appellant's pleader has not denied these propositions of law, but he maintained that the defendants having allowed the agent to prefer an appeal against the decree in Suit No. 1035 of 1880, the defendants had no right to question the agent's authority to conduct proceedings relating to the execution of the decree passed in that appeal. He urged that the present attempt of the respondents was to make nugatory the decree of the Appellate Court. The contention, however, is, in

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my opinion, untenable. The decree of the Appellate Court stands good, and it can well be maintained that the defendants are estopped from raising a question as to the validity of that decree on the ground of jurisdiction. But I do not see how the doctrine of estoppel can be carried further than that. The contention of the defendants is—"let the decree stand good, but the execution proceedings should be conducted by the right person." It is no answer to say that because the suit was conducted in appeal by a wrong and unauthorized party, the execution proceedings in appeal should also be allowed to be conducted by an unauthorized person. If Párvatibái thought that the order of lower Court was wrong, she ought to have preferred this appeal in her own name.

Against this decision a second appeal was preferred to the High Court.

Mánekshák Jehángirshák for the appellant.—The agent conducted the whole litigation under a general power of attorney. Such a power having been acted on up to the final decree in the suit, entitles the agent to go on with execution. He had power to do everything in connection with the suit, though the principal resided within the jurisdiction of the Appellate Court. *Mungul Perashád's Case*[1] shows that an application for execution is one made in the suit.

Shámráv Vithal for the respondents:—Section 37 of the Code of Civil Procedure allows a recognized agent to appear for his principal, when the latter is not within the Court's jurisdiction. In the present case the agent had authority to represent his principal in the Subordinate Judge's Court at Mahád, but not at Thána, as the principal was a resident of Thána. The principal should have applied for execution in person.

WEST, J.:—In the present case the Subordinate Judge has in appeal held that Sadáshiv, who, as agent under a general power, properly conducted a suit for Párvatibái in the Court of the Subordinate Judge at Mahád, cannot represent her in the District Court in questions arising on appeal in the execution proceedings. Párvatibai, it appears, resides within the District of

[1] L.R., 8 I. A., 123.

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Thána, though not within the sub-division under the Court at Mahád, and the Subordinate Judge in appeal thought that the representation by agent could not operate when the lady herself was within the jurisdiction. But it is to be observed that she was thus represented, and apparently with the assent of the defendants themselves, throughout the litigation which led to the decree now in question. Sadáshiv, as appellant, acting for Párvatibái, obtained a decree against the defendants in the District Court. In the appeal thence to this Court, Sadáshiv was made a respondent. Under these circumstances, we think that he cannot now, at the instance of the defendants, be prevented from executing, as agent, the decree which he has obtained as agent. His right to represent Párvatibái might have been challenged in the appeals, and possibly the same reasons would apply to representation in an appeal as in an original suit, but the objection having been virtually waived, cannot be taken after the defendants have had their chance of success in the litigation. Compare *Bisandás* v. *Lakhimchand*(1). It is only Párvatibai herself who can now supersede Sadáshiv.

We, therefore, reverse the decree of the Subordinate Judge, and remand the case for disposal on the merits. Costs to abide the event.

(1) 6 Bom. H. C. Rep., 159, A. C. J.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

SHEK SULEMA'N AND ANOTHER, (ORIGINAL SURETIES), APPELLANTS, *v.* SHIVRA M BHIKA'JI AND ANOTHER.* 1887. *April* 21.

Sureties—Right of surety to appeal—Extent of sureties' liability—Attachment before judgment—Security under Section 484 *of Civil Procedure Code (XIV of* 1882*)—Decree—Stay of execution by Appellate Court—Fresh security under Section* 545 *of Civil Procedure Code (XIV of* 1882*)—Liability of original sureties.*

A surety against whom a decree is sought to be enforced under section 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution proceedings.

*Second Appeal No. 496 of 1886.

1887.

SHEK SULEMÁN v. SHIVRÁM BHIKÁJI.

A. and B. became sureties, under section 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of property attached before judgment by the Court of first instance Under their surety-bonds they were bound, in default, "to pay to the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favour for Rs. 229-14. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under section 545, "for the due performance of such decree or order as may *ultimately* be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favour for Rs. 800 and costs.

Thereupon the decree-holder sought to enforce the appellate decree against the sureties A. and B. under section 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond, which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security.

Held, that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant" The security given to the Court of first instance was for the satisfaction of its decree—not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the terms on which it would take security for the execution of its own decree.

Held, also, that as soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the Appellate Court.

THIS was a second appeal from the order of H. Batty, Acting District Judge of Ratnágiri, in Miscellaneous Appeal No. 15 of 1885.

The plaintiff, Shek Ahmed, filed a suit in the Court of the Second Class Subordinate Judge at Vengurla, and obtained an order for attachment, before judgment, of certain property belonging to the defendant. Thereupon Shek Suleman and Rámá

Bhikáji together with a third person became sureties, under section 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of the property which had been attached. They executed a surety-bond in the form prescribed by the High Court[1].

The Subordinate Judge passed a decree in the plaintiff's favour for Rs 229-14, with costs. Both parties appealed against this decree to the District Court. In that Court the defendant applied for and obtained an order for stay of execution of the original decree on his furnishing security, under section 545 of the Code of Civil Procedure, "for the due performance of such decree or order as may *ultimately* be binding on him." His surety was the third of the three persons who had become sureties in the Court of first instance. The District Court passed a decree, in the plaintiff's favour, of Rs 800 and costs.

Thereupon the decree-holder applied for execution of the appellate decree, both against the judgment-debtor and against the two sureties, Shek Sulemán and Rámá Bhikáji. The sureties resisted this application, on the ground that the security bond continued in force only until the original Court passed a decree, but that the decree-holder having taken a fresh security for the due performance of the appellate decree, the original liability had become cancelled.

(1) *Vide* Circular Orders Book, page 226 The material part of the security bond was as follows —

"Whereas in the suit above specified the plaintiff . aforesaid has applied to the said Court that the said defendant may be called upon to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do certain property of the said defendant may be attached,

"And whereas a warrant has been issued by the said Court to the Názir of the said Court, commanding him to call upon the said defendant to furnish security in the sum of Rs. . .

"Therefore, I have voluntarily become security, and do hereby bind myself, my heirs, and executors, to the said Court that the said defendant .... shall produce and place at the disposal of the said Court, when required, the property herein below specified, or the value of the same, or such portion thereof as may be sufficient to fulfil such decree; and, *in default of his so doing, I bind myself, my heirs, and executors, to pay to the said Court at its order such sum .. . ...as the said Court may adjudge against the said defendant.*"

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This contention was disallowed by both the lower Courts They held that the sureties were liable, under their bond, to satisfy the decree of the Court of appeal.

Against this decision the sureties, Shek Sulemán and Rámá Bhikaji, appealed to the High Court.

Mánekshák Jehángirshák for the appellants.

Ghanashám Nilkant for the respondent.

At the hearing of the appeal, a preliminary objection was taken by the respondent's pleader, that the sureties had no right of appeal under the Code of Civil Procedure. He cited *Appáji Bhivráv* v. *Shivlál Khubchand*[1]

Mánekshák Jehángirshák for the appellant relied on *Ex parte Bhikáji Vithal Ambekar*[2].

PER CURIAM:—As the Legislature, in view of the rulings in *Ex parte Bhikáji Vithal Ambekar*[2], *Ghoree Lál Jha* v. *Sheo Náráin Singh*[3] and *Akhoot Rumanah* v. *Ahmed Eusoofjee*[4], retained in Act XIV of 1882, sec. 253, the same language substantially as it had used in section 204 of Act VIII of 1859, we must suppose that it approved of the interpretation put on that language by the High Court; otherwise we should have felt a difficulty with advertence to *Hermitage* v. *Kilpin*[5], *Rushforth* v. *Beatson*[6], and the language of Lord Selbourne in *Bradlaugh* v. *Clarke*[7].

The previous decisions have given to the surety a right of appeal as if he were a party, and we must allow it. See *Fraser* v. *Ehrensperger*[8].

Mánekshák Jehángirshák for the appellants:—Under the surety-bond the appellants are liable only to fulfil the decree passed by the Court of first instance, and not in appeal. Section 253 of Act XIV of 1882 shows that only the decree in the original Court is to be enforced against the sureties. The rulings in *Nárâyan Dev* v. *Gajan Dikshit*[9] and *Shivlál Khubchand* v *Apáji Bhivrav*[10] do not apply. They were made under Act VIII of 1859 The

(1) I. L. R., 3 Bom., 204
(2) 4 Bom. H. C. Rep., 119, A. C. J.
(3) 8 Calc. W. R., Civ. Rul., 24.
(4) 15 Calc. W. R., Civ. Rul., 538
(5) L. E., 9 Ex., 205
(6) 1 Price, 343
(7) L. R., 8 App Cas. at p. 357.
(8) L. R., 12 Q B. Div., 310
(9) 10 Bom. H. C. Rep., 1.
(10) I. L. R., 2 Bom., 654.

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original decree is now superseded by the appellate decree, and the fresh security taken by the Appellate Court extinguishes my clients' liability under their bond. Again, the order for stay of execution was made without our knowledge and consent. The extension of time thereby allowed to the judgment-debtor discharges the sureties. He referred to *Nilvaru* v. *Nilvaru* (1), and *Bishenmun Singh* v. *The Land Mortgage Bank of India* (2).

Ghanashám Nilkant for the decree-holder :—The new security bond did not extinguish the former one. The decree-holder did not give time, nor accept new terms, so as to affect the liability of the sureties. Section 484 of the Code of Civil Procedure regulates their liability. The security bond does not confine their liability to the amount of the original decree. The Code gives a litigant the right of appeal, and expressly provides for a stay of execution. The sureties must be taken to have known that there was a possibility of an appeal and a stay of execution. Their liability is, therefore, not affected by an appeal being made, or a postponement of execution.

A suit includes an execution proceeding: see *Mungul Persháď's Case* (3).

WEST, J. :—In this case the appellants became sureties along with a third person, under sections 483, 484 of the Code of Civil Procedure, for the production of property attached in the course of a civil suit by the Court of first instance. The decree was in favour of the plaintiff as to part of his claim. Both parties appealed to the District Court, and in that Court the defendant, in order to get execution stayed, gave security for the fulfilment of that Court's decree. His surety was the third one of those who had bound themselves in the Court of first instance, and he does not now dispute his liability.

The decree in appeal awarded a greatly increased sum to the plaintiff. The two sureties now before the Court, on their failing to cause the property of the defendant to be placed at the disposal of the Court of first instance for execution of the decree in appeal, have been held liable for the amount of that decree.

(1) I. L. R., 6 Bom., 110. (2) I. L. R., 11 Calc., 244
(3) L. R., 8 I. A., 129.

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They now contend (1) that the decree of the Court of first instance having merged in that of the District Court, they are not liable at all under a security for execution of the decree only of the former Court; (2) that, at any rate, they are responsible only for so much as was there adjudged against the defendant; and (3) that this original liability has been extinguished by the total change of circumstances created when the District Court without their assent postponed execution of the first decree at the request of the defendant, and thus allowed him a delay which affected, or, at any rate, might materially affect his solvency as it existed when the first decree was passed against him.

We have already ruled that, on the decisions, an appeal lies in the present case; and proceeding now to consider the several points of objection to the judgments of the Courts below, we think (1) that the decree of the Court of first instance, immediately on its being made, satisfied the condition under which the sureties became severally bound to cause the defendant to place at the disposal of the said Court, when required, the property specified in their bond. In default they became bound "to pay to the said Court.....such sum as the said Court may adjudge against the said defendant." This liability having thus been fully incurred was not extinguished by appeal being made against the decree. If the amount recoverable by the plaintiff should be diminished in appeal, the amount of which payment could be enforced would be diminished to a like extent, and the sureties' engagement being one of indemnity would diminish in the same proportion. So, too, if the decree being reversed the sum recoverable became zero, the sureties' liability would be reduced to nothing. This was involved in the nature of their engagement, but it did not cease to be an engagement, because the decree of the first Court merged in that of the Appellate Court. The liability had been fully incurred whatever afterwards happened, though in its nature variable as to amount.

But (2) we think that on the terms of the bond, as already quoted by us, and equally on the intention of the Legislature the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the

Court of first instance. This and no other sum would be such "as the said Court may adjudge against the said defendant." Under sections 483, 484 of the Code of Civil Procedure, the security is to be for the defendant's placing at the disposal of the Court of first instance such property as shall satisfy its decree, not the possible decree of a higher Court. Section 488 says that an attachment shall be raised when the suit is dismissed, though an appeal may still be competent to the plaintiff. Under section 479 a defendant may be called on to furnish security for his appearance. The surety has to bind himself on the defendant's default to pay the sum awarded against the defendant in the suit, but no one, we suppose, would extend this to the amount afterwards awarded in the first or the second appeal. What the Code contemplates in such case is apparently security to be given to the Court for the execution of its own decree which in the regular course should promptly follow judgment. If an appeal is made, it is left to the Appellate Court to regulate the terms on which it will take security for the execution of its own decree. The security for its satisfaction may or may not be coincident in the liability it involves with one already incurred in the Court of first instance.

As to that liability (3), we think it is not affected by a postponement of the execution, which must have from the first been contemplated as possible and not improbable, because it is expressly provided for by the Code of Civil Procedure.

For these reasons, we modify the decrees of the Courts below and pronounce the appellants liable to the decree-holders for the amount of the decree of the Court of first instance.

Costs of this appeal and of the Courts below to be in proportion to the amounts sought and now awarded.

APPELLATE CIVIL.

Before Mr Justice West and Mr Justice Birdwood

1887
April 21.

YASHVANT NA'RA'YAN ADARKAR, (ORIGINAL OPPONENT), APPELLANT, *v.* XAVIER J J. V DESOUZA (ORIGINAL APPLICANT), RESPONDENT *

Civil Procedure Code (Act XIV of 1882), *Sec* 617—*Pleader—Professional conduct*

Section 617 of the Code of Civil Procedure (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties

A pleader was fined Rs 25 by a Second Class Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court, under section 617 of the Code of Civil Procedure (Act XIV of 1882)

Held, that the inquiry into the pleader's professional conduct was of a disciplinary, and not litigious, character The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious In such an inquiry no reference could properly be made, under section 617 of Act XIV of 1882

THIS was a reference, under section 617 of the Code of Civil Procedure, by H Batty, Acting District Judge of Ratnágiri

One Yashvant Náráyan Adarkar, a pleader practising at Vengurla, in the Ratnágiri District, was fined Rs. 25 by the Second Class Subordinate Judge of Vengurla for refusing to act on behalf of his client, Xavier J J. V. DeSouza, after receipt of retaining fee. Yashvant Náráyan appealed to the District Court.

The District Judge referred the following questions to the High Court for decision :—

"1. Is a pleader justified in refusing to act for a client, on the ground that in a former case he had been engaged by the party to whom under his new engagement he would be opposed, unless his previous engagement has placed him in possession of facts, &c., that would give him an undue advantage?

"2 Is a pleader justified in receiving a retaining fee, with a conditional acceptance of his duties?

"3. Does a pleader by refusal to act after accepting the retaining fee commit an offence under section 50 of Regulation II of

* Civil Reference, No. 8 of 1887.

1827? Or is it sufficient justification that he believes *bonâ fide* that his undertaking is inconsistent with a previous engagement, when that belief has been formed on facts which he might have ascertained before accepting the fee?

The District Judge's opinion on the first and second points was in the negative; on the third he held that the offence was complete, whenever a refusal to act was given after the acceptance of a retaining fee, provided the disqualifying facts could with reasonable inquiry have been ascertained before acceptance of the fee.

Ghanashám Nilkant for the appellant and original opponent.

Máneksháh Jahángirsháh for the respondent and original applicant.

At the hearing of the reference Mr. Ghanashám raised a preliminary objection, contending that the reference, not being made on a question of law or usage arising in the course of a suit or appeal, was not authorized by section 617 of Act XIV of 1882. He relied on *Ghellá Táráchand* v. *The Collector of Ahmedabad*[1].

WEST, J.:—The present reference has not been made as to any point arising in a litigation between parties before the District Court in a suit or appeal or in a matter wherein the Court was in the proper sense called on to adjudicate,—that is, to pronounce on the opposite pretensions of contending parties. In the case of *Ghellá Táráchand* v. *The Collector of Ahmedabad*[1] Sargent, C.J., and Melvill, J., held that the District Court could not refer to the High Court even a point that arose in a contention connected with the Land Acquisition Act, X of 1870, and such a case would, it seems, be more analogous to an ordinary litigation than one in which the District Judge had only to consider whether or not a pleader had been guilty of professional misbehaviour. An inquiry of this kind is of a disciplinary character. See *In re Hardwick*[2]. Being disciplinary, it is not litigious, and the fact that an appeal is allowed from the Subordinate Judge to the District Judge does not make it litigious. Sections 617, 647 of the Code of Civil Procedure cannot, according to the case we have quoted,

(1) Printed Judgments for 1882, p. 257. (2) L. R., 12 Q. B. Div., 148.

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authorize a reference, except in a matter of litigation, and we must decline to entertain the one now made to us. The District Judge will act on his own view of the facts and the law.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *May 5.*

KRISHNA'JI AND ANOTHER, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VITHALRA'V AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Vatan deshmukhi—Grant of profits of such vatan in perpetuity—Hereditary gumdsta—How far such grant valid after the death of the grantor—Limitation—Adverse possession—Decree, proceedings in execution of, against the original debtor—Such proceedings not binding upon persons not parties to them.

By a *sanad* duly executed on the 20th August, 1850, the plaintiffs' father, Yashvantráv, who was a *vatandár deshmukh*, appointed the defendants and their heirs hereditary *vatani gumdstds*, and granted, by way of remuneration for their services, Rs. 201 and a quantity of grain out of the annual *vatan* income in perpetuity. In consideration of certain sums obtained from the defendants, Yashvantráv mortgaged the *vatan* property to the defendants, who subsequently sued Yashvantráv upon the mortgage. That suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against Yashvantráv. In 1859, execution of the decree was granted against Yashvantráv. In 1864 the services connected with the *vatan* were discontinued by Government. In 1871 Yashvantráv died. The defendants having kept the decree alive, sought in 1881 to execute the decree against the plaintiffs' eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue.

The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer entitled to the allowance under the *sanad*, and for an injunction restraining the defendants from execution of the decree against the *vatan*. The defendants contended *(inter alia)* that the *sanad* could not be cancelled, Yashvantráv having granted it as full owner; that the receipt, by the defendants, of the allowance had been adverse since 1864, when their services had ceased; and that the execution proceedings against the plaintiffs' father and their elder brother in 1859 and 1881, respectively, bound the plaintiffs. Both the lower Courts decided in favour of the plaintiffs. On appeal by the defendants to the High Court,

* Second Appeal No. 692 of 1885.

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Held, confirming the decree of the lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the *vatan* was vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumástás*, nevertheless the remuneration attached to the office by Yashvantráv was in derogation of his successor's rights, and was, therefore, at any rate in the absence of proof of custom, invalid against them.

Held, also, that having regard to the terms of the *sanad* it was in the power of the original grantor, or any of his successors, to determine the office and the remuneration at any time after the *vatan* services ceased in 1864.

Held, also, that, assuming the grant by Yashvantráv to be invalid as against his successor, adverse possession would only run against the plaintiffs from the time of his death in 1871, and the present suit having been filed within twelve years from that date was not barred.

Held, further, that the proceedings in execution of the decree of 22nd June, 1859, including the order of the 18th June, 1881, did not bind the plaintiffs under section 244 of the Civil Procedure Code (Act XIV) of 1882, the plaintiffs not having been parties to them.

THIS was a second appeal from a decision of A. C. Watt, Acting District Judge of Poona.

In 1850 one Yashvantráv, the plaintiffs' father, who was a *vatandár deshmukh*, passed a *sanad* to the defendants, whereby he appointed them hereditary *vatani gumástás*, and assigned to them, in perpetuity, Rs. 201 and 15 maunds of grain out of the income of the *vatan* property, (the management of which was entrusted to the defendants), as remuneration for their services as such *gumástás*.

The material portion of the *sanad* was as follows:—"You, Krishnáji and Parashrám, are in my *padre* (*i.e.* protection) for many days, and on account of a *deshmukhi vatan* you have taken a great deal of trouble, and I recognizing this * * * passed to you a *sanad* as respects the *vatani gumástáship* of seventeen villages at Niratir, and you are having *vahivát* (management) accordingly * * * Therefore in the said tarf Niratir you are to have the *deshmukhi vahivát*, and in terms of the former *sanad* Rs. 201 in cash and 15 maunds of grain of the Baroli measurement as remuneration *(vatan)*, and respecting the *vahivát* of the said tarf Niratir, as to collecting money, giving answers, you and your descendants are to perform this work for the said remuneration * * * "

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Subsequently, in consideration of certain sums advanced by the defendants to the plaintiffs' father, he mortgaged the *vatan* property to the defendants, who having sued him upon the mortgage, the suit was referred to arbitration. An award was duly made, and a decree was passed on the award in 1859. The defendants sued out execution of the decree in that year against the plaintiffs' father. In 1864 the *vatan* services were remitted under the Summary Settlement Act, and the defendant's office of *gumástá* became thenceforward a sinecure. The plaintiffs' father died on the 12th November, 1871.

In 1881 the defendants, who had kept alive their decree, sought execution against the eldest brother of the plaintiffs. He filed objections, but his objections were disallowed, and execution proceeded.

The plaintiffs brought the present suit on the 10th November, 1883, to have it declared that the defendants were no longer entitled to the allowance which they claimed under the *sanad*, and for a perpetual injunction restraining the defendants from executing the decree of 1859 against the *vatan* property.

The Subordinate Judge of Poona passed a decree in favour of the plaintiffs, and his decree was confirmed, on appeal, by the District Judge.

The defendants preferred a second appeal to the High Court.

Shántárám Nárayan for the appellants:—It was competent to Yashvantráv to make such a grant. A father represents the whole estate—see *Rádhábái* v. *Anantráv*(1)—and the decree obtained against him binds his sons. The *sanad* expressly granted the income; and the circumstance that the services subsequently ceased, would not affect the rights of the appellants to the emoluments of the office of hereditary *gumástas*. They have enjoyed them adversely for twenty-five years continuously. The sons of Yashvantráv cannot now object, having acquiesced until their father's death. The appellants' appointment was hereditary, and the fact that their services were dispensed with, does not affect the tenure.

(1) I. L. R., 9 Bom., at p. 217.

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Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the respondents:—The lower Courts were right in deciding in the plaintiffs' favour. Yashvantráv could not create a right in derogation of the rights of his successors Under the *sanad* nothing beyond a personal obligation was created, which obligation ceased on his death. The decree against Yashvantráv could not be executed against the respondents. The plaintiffs were not parties to the execution proceedings. No hereditary *gumástá* could be appointed: see *Rávji Raghunáth* v. *Mahádevráv Vishvanáth*[1]. The appointment of the appellants, therefore, cannot hold good after Yashvantráv's death. The possession of the emoluments cannot be adverse, as the suit was within twelve years after the death of Yashvantráv.

SARGENT, C.J.:—The plaintiffs, who are the sons of Yashvantráv, a *deshmukh*, pray for a declaratory decree that the defendants are not entitled to any portion of the profits of the *deshmukhi vatan*, and for a perpetual injunction restraining them from executing a decree of 22nd June, 1859, obtained by them against Yashvantráv against the *vatan* property. The defendants base their claim on a *sanad* executed in their favour by Yashvantráv on the 26th August, 1850, by which he appointed them hereditarily the *vatan gumástás*, and as remuneration for the performance of its services therein particularly specified, assigned to them Rs. 201 in cash and 15 maunds of grain, to be deducted from the income of the *vatan* coming to their hands. Yashvantráv died on the 12th November, 1871. It is not in dispute that the *vatan* services were remitted on 23rd January, 1864, under the Summary Settlement Act, and that the office of *gumástá* is now a sinecure.

With respect to the objection taken to the value of the suit being more than Rs. 5,000, and, therefore, beyond the jurisdiction of the Second Class Subordinate Judge, we think the reasons given by the lower Court of appeal conclusive. There were not materials before the Subordinate Judge to show that the value exceeded Rs. 5,000, nor was the point taken before him; and,

(1 2 Bom. H. C. Rep., 237.

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lastly, there is no evidence before us to enable us to say that the Subordinate Judge had not jurisdiction.

Passing to the merits of the case, the first question is, whether Yashvantráv could appoint an hereditary *vatani gumástá* and assign to the office a remuneration, in perpetuity, payable out of the income of the *vatan*. In *Rávji Raghunáth* v *Mahádevráv Vishvanáth*[1], it was held that the holder of a *deshpánde vatan* cannot create an hereditary deputy, and that no such appointment could have effect beyond the incumbent's life, being beyond the competency of the holder of the *vatan*.

In the present case the management of the *vatan* is vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumástás*, but the remuneration attached to the office is equally in derogation of the successors' rights, as in the case of a deputy, and is, therefore, at any rate in the absence of proof of custom, invalid against such successors, but in any case we think that, having regard to the terms of the *sanad*, it was in the power, whether of the original grantor or any of his successors, to determine the office and the remuneration at any time after the *vatan* services ceased, as was the case in 1864. The *sanad* is, in terms, the grant of an office the performance of whose duties are remunerated by a portion of the income of the *vatan*, and which in *Forbes* v *Meer Mahomed Tuquee*[2] is treated by the Privy Council in discussing the general question as liable to resumptions when the services cease.

It was said, however, that the defendants must be deemed to have been in adverse possession of the 201 rupees and the 15 maunds of grain since 1864, when the services ceased. Assuming the grant to be invalid, as we have held, as against the successors of Yashvantráv on his death, adverse possession would only run from that time as against them, and twelve years had not elapsed before the present suit was filed; and although the grant might have been cancelled by Yashvantráv in 1864, there is no evidence to show that it was so cancelled by him, or that the defendants ever claimed or enjoyed the Rs. 201 and 15 maunds of grain during Yashvantráv's life otherwise than in virtue of the office.

(1) 2 Bom. H. C. Rep., 237. (2) 13 Moore's I. A., 438.

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As regards the latter view of the plaintiffs' rights, although there has been no formal resumption by them of the *sanad*, the present suit may be treated as having that effect, without prejudice to the defendants, who, if they could have proved a custom, would have done so to establish their right to create an hereditary *gumáshtá* notwithstanding the inalienability of the *vatan*.

With respect to the proceedings in execution of the decree of the 22nd June, 1859, the surviving plaintiffs were not parties to any of them, including Mr. Ranade's order of the 18th June, 1881, and are, therefore, not bound by them under the provisions of section 244 of the Code of Civil Procedure.

In either view, therefore, of the *sanad* we are of opinion that the plaintiffs are now entitled to the declaratory decree and injunction as prayed for, and the decree of the Court below should be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

PA'LLONJI MERWA'NJI, (APPLICANT), *v.* KA'LLÁBHA'I LALLUBHA'I AND ANOTHER, (OPPONENTS).*

1887. *June* 13.

Pleader and client, their rights and obligations inter se—Regulation II of 1827—*Confidential communications made in the course of professional employment.*

The rules prevailing in England with regard to the rights and obligations of solicitors in relation to their clients apply, with slight difference, to pleaders practising in India. The principles deducible from the English cases are as follows:—

1. A party to a judicial proceeding is entitled to such professional assistance as he thinks will best suit him.

2. A pleader is free to place his services at the disposal of any such party upon such terms as he may think most advantageous to himself consistently with the honour of his profession and the due administration of justice.

3. A pleader who receives any confidential information from his client in the course of his professional employment is not at liberty to carry that information

* Application under Extraordinary Jurisdiction, No. 191 of 1886.

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into the service of his antagonist, or any one who in that very litigation or in any subsequent litigation may be opposed to the client furnishing the information.

4. Under Regulation II of 1827, pleaders receive certain fees, in return for which they are not at liberty to act against those retaining them, whether they are retained by one client singly or by two or more clients jointly.

A pleader who has acted for several persons will not be restrained from afterwards acting for some of them only as against the others, unless it be shown that he is possessed of knowledge arising from his previous employment which might be prejudicial to his other clients.

As a general rule, the Court will require a very strong case to be made out before it will interfere by way of injunction, restraining a pleader from appearing for a client, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client. In case of his possessing such knowledge, he will not be allowed to throw up the conduct of the case and transfer his services. He will never be allowed to discharge himself from the conduct of the case if the case raises even a probability of prejudice to his former employers.

K., a pleader, was at first retained by P. and N. jointly to defend a suit on their behalf. At a later stage of the case, P. and N. quarrelled. Thereupon K. applied to the Court for leave to withdraw from the conduct of the case, on the ground that he could not attend to the interests of both P. and N. The Court allowed him to withdraw A few days afterwards, K. appeared in Court, and filed a *vakalatnáma*, or warrant of attorney, signed by N., and claimed to conduct the case on behalf of N. alone. P. objected to this; but the Court disallowed this objection.

Thereupon P. made an application to the High Court for an injunction restraining K. from acting on behalf of N. alone.

Held that as it was not made out that K. was in possession of any confidential information either from P. or from P. and N. together, such as would give him an unfair advantage when acting on behalf of N., the Court would not interfere or restrain K. from serving N. alone.

Held, further, that a pleader in such circumstances should take the direction of the Court as to which of two or more clients he is to serve, and as to the disposal of the fees he has received from them jointly.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The applicant Pállonji and one Nassarvánji were defendants in Original Suit No. 160 of 1882 in the Court of the First Class Subordinate Judge of Surat. Both the defendants engaged Mr. Kállábhái Lallubhái, a *vakíl* of the High Court, to appear and plead on their behalf in that suit. Mr. Kállábhái conducted

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the case on behalf of both the defendants until 4th August 1886. On that day he presented an application to the Court, praying to be relieved from the conduct of the case, on the ground that his clients had quarrelled, that their interests now appeared to clash, and that he could not, therefore, appear for both.

The Court allowed Mr. Kállábhái to withdraw from the case.

A few days afterwards he appeared in Court and filed a fresh *vakalatnámá* on behalf of the defendant Nassarvánji alone, and claimed to conduct the case on his behalf.

The other defendant, Pállonji, thereupon objected, and applied to the Court to restrain Mr. Kállábhái from appearing on behalf of his co-defendant.

This application was rejected. The Court held that there was no objection to Mr. Kállábhái's appearing on behalf of one of his former clients. Thereupon Pállonji made the present application to the High Court for an order restraining Mr. Kállábhái from conducting the case on behalf of Nassarvánji. He also prayed that the Court should take such further notice of the pleader's professional conduct as it might deem fit.

It was urged (1) that it was improper and unprofessional for Mr. Kállábhái to appear for Nassarvánji, the co-defendant, after having withdrawn from the case; and (2) that as he had received full instructions from the applicant, and had become acquainted with the whole of his case, he ought not to be allowed to appear on behalf of the co-defendant.

A rule *nisi* was granted on the 9th December, 1886, calling upon Mr. Kállábhai and his client Nassarvánji to show cause why the former should not be restrained from further acting on behalf of the latter.

Mánekshán Jehángirshán for the applicant.

Shántárám Náráyan for opponent No. 1.

Shivrám V. Bhandárkar for opponent No. 2.

WEST, J.:—This is an application made by Pállonji for restraining Mr. Kállábhái Lallubhái, a pleader engaged by him and his co-defendant Nassarvánji in a certain suit brought against them

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both by one Jamsedji in the Court of the First Class Subordinate Judge of Surat, from appearing and acting for Nassarvánji alone, since he, Mr. Kállábhái, had with the permission of the Court withdrawn from the conduct of that case for them both. The applicant also prayed that this Court should take such further notice of the conduct of Mr. Kállábhái as a pleader as to it might seem proper.

A rule *nisi* was granted by us on the 9th December last, calling upon both the opponents to show cause why Mr. Kállábhái should not be prohibited from further acting on behalf of Nassarvánji.

We have heard Messrs. Shántárám Náráyan and Shivrám V. Bhandárkar, who appear to show cause, and Mr. Máneksháh Jehángirsháh in support of the rule, and we do not think there is good ground shown for making the rule absolute.

In disposing of this case we have to act very much on principles or in accordance with the rules prevailing in England with regard to solicitors.

The principles that can be gathered from cases decided in England are chiefly these:—

1. Any person who needs professional assistance has a right to get the services of any one who is qualified for the purpose, and whom that man chooses.

2. Those persons who have satisfied the requisite conditions and passed the necessary tests and who render professional advice have a right to earn due emoluments for their services in such ways as are consistent with the honour of their profession and the due administration of justice.

3. Those persons who have been given information in their service as professional advisers, and who act for him who has engaged them, are not at liberty to carry that information into the service of his antagonist or any one who in that very litigation or in any subsequent litigation may be opposed to the client furnishing the information.

4. In India, these rules though apply with some slight difference, the pleaders under Regulation II of 1827 receive certain

fees, in return for which they are not at liberty to act against those retaining them, whether they are retained by one client singly or by two or more persons jointly.

The difficulty in such cases as the one now before us arises when clients jointly engage the services of a pleader, and when the latter happens subsequently to be engaged by some one or other of them, but not all, but in reference to the same subject-matter.

When a pleader who was once engaged by a number of persons jointly and as a composite body is subsequently engaged by one of them separately, the English cases lead to the conclusion that such a succession of services can under particular circumstances occur without any breach of honour and professional etiquette. If there is any unfair communication or use of information, that must be checked as improper.

Mr. Shántárám in the course or his argument stated that his client, Mr. Kállábhái, had already pressed Mr. Nassarvánji to engage another pleader to conduct the case, for him, and that the latter had done so. But that does not affect the merits of the questions raised by the applicant, Pállonji; because mere outward withdrawal from a case would not prevent a pleader from advising the client as regards the conduct of the case, or from giving him any information that might have been derived from his former clients during his employment. Such a course, instead of being of any substantial advantage to the applicant, would but tax his antagonist with an additional fee.

The case of *Robinson* v. *Mullett*[1] establishes that a solicitor who has acted for several persons will not be restrained from afterwards acting for some of them only, as against the others, unless it be shown that he is possessed of knowledge arising from his previous employment which might be prejudicial to his other clients.

The case of *Grissell* v. *Peto* and others also refer to similar questions arising between solicitors and their clients, and the general result of the examination of all these cases is that the Court will require some very strong case to be made out before

(1) 4 Price's Rep., p. 353. (2) 9 Bing., 1,

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it will interfere by way of injunction, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client. In case of his possessing such knowledge he will not be allowed to throw up the conduct of the case and transfer his services He will never be allowed to discharge himself from the conduct of the case even if the case raises a probability of prejudice to his former employer or one of his clients—at any rate he must not change sides.

In the present case down to a late stage as between the plaintiff and defendants Mr. Kállábhái was engaged, and he acted for both the defendants. In the evidence of Nassarvánji some facts were revealed, which showed that Pállonji might have claims against Nassarvánji in respect of certain collections made by the latter out of properties under his management.

When matters reached that stage, Mr. Kállábhái stated that he could not conduct the case for both the defendants, and on applying to the Court, got his discharge.

The case as between the plaintiff and the defendants would, in his opinion, necessitate the adjudication of some rights as between Pállonji and Nassarvánji *inter se*, and he properly thought himself justified in a claim to be discharged from his liability to serve them both.

The question is, what should he have done under the circumstances? As a pleader of the High Court he must or he ought to have known that though the interests of both of his clients appeared to clash, it was still possible or rather desirable for him to serve one or other of the two, and the more so since he himself admitted that he was not in possession of any confidential information from either of them.

The proper course was for him to go to the Judge and ask his direction as to how he should act,—that is, for one or the other of the two clients, and to conduct the case according to the advice thus given him up to the end. The Judge, after hearing the clients if necessary, would have said, "you, Mr. Kállábhái, take up the case of Nassarvánji or Pállonji" (as to him might have seemed proper) "and as the other client will be forced to

engage another pleader, I will make an order regarding the return of part of the fee paid by both together, in order that he may with that engage another pleader to conduct the remainder of the case for him."

It was not the right course for him to get a discharge wholly from the conduct of the case and then get himself engaged without any refund by whoever paid him the higher additional fee. A pleader might thus be tempted to go to his clients and say, "I shall serve him who pays me the higher fee, and thereby secure an unfair advantage to him." The intervention of the Judge after notice to the parties would prevent temptation and avert suspicion.

It is not made out in this case that Mr. Kállábhái got from Pállonji or from Pállonji and Nassarvánji together such definite instructions as would give him an unfair advantage when acting in favour of Nassarvánji alone. We decline, therefore, to say that Mr. Kállábhái should be restrained from serving Nassarvánji in the case, or that he is not to use this or that information; but we direct that the matter should go to the First Class Subordinate Judge of Surat, who should make such orders as to him appear just and proper as regards fees paid first by Pállonji and Nassarvánji both and also by Nassarvánji alone.

In future it should be the rule that a pleader in such circumstances should take the Court's advice as to which of two or more clients he is to serve and as to the disposal of the fee he has received from them jointly, and it will deal with the question on the principles laid down in this order and in the cases herein referred to.

We discharge the rule. Each party to bear his own costs.

Rule discharged.

NOTE.—The following is a copy of the judgment delivered by West, J., as Judge of Sadar Court in Sind, in *Reg.* v. *Hezonji Nowroji*, in which the same points were discussed:—

The cardinal principles on which a case, like the present, must be disposed of are, first, that a party to a judicial proceeding is entitled to avail himself of such professional assistance as he thinks will best suit him; secondly, that a pleader is free to place his services at the disposal of any such party upon such terms

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as he may think most advantageous to himself; thirdly, that facts confidentially communicated to a pleader in the course of his professional employment must not be made use of to the detriment of the employer. This last principle so limits the operation of the other two that no pleader ought, by a second engagement, to put himself into a position in which he will be under a temptation to promote the interests of the new client by using for his benefit the confidential statements made by the previous one to the detriment of the latter.

From the mere naked statement of these leading principles no one probably would be inclined to dissent, but the precise extent to which in an actual case the third ought to govern the application of the other two is sometimes a matter not quite easy to determine. It is not to be disputed that a defendant must not bribe a plaintiff's solicitor to change sides. Nor must a solicitor dismiss himself for such a purpose. The case of *Cholmondeley* v. *Clinton*(1) furnishes an instance in which the latter rule was applied to the case of a solicitor, who left a partnership under an agreement with his late partner not to act for a particular client, and who then sought to transfer his services to the other side. This was disallowed by Lord Eldon, Chancellor, after consulting all the Judges, on the ground that the solicitor could not by any bargain with his partner discharge himself from his obligations to the client of the firm, and that it must, for practical purposes, be assumed that the real motive for his new employment was a desire to take advantage, adversely to this duty, of the special knowledge he had acquired.

A solicitor discharged for misconduct stands on the same footing as one who has discharged himself. This is absolutely necessary; because, otherwise, he would only have to misconduct himself so grossly as to make his further retention impossible in order to be set free to serve the other side.

The distinction between such a case and that of a solicitor dismissed for no misconduct has always been recognized. In the latter case the client who has voluntarily parted with his solicitor cannot complain of his going into the adversary's service. All he can claim is that his own secrets shall still be religiously guarded against disclosure. It may be that there never were any secrets. It may be that what once were secrets have since become knowledge available to all through proceedings in Court or by other means. In such cases no reasonable objection can be raised. If the secrets, however, still subsist as such, the solicitor must not take them over with him; and as he cannot really divest himself of the knowledge confidentially acquired in his first employment, he ought to decline the second. The same reason applies when the former service has altogether ceased through the close of the litigation. The solicitor's duty does not end with his employment, and those confidences which he might refuse to break as a witness on oath he must not betray to serve his own purposes. In *Davies* v. *Clough*(2), a solicitor formerly engaged in a transaction for a lady, by which she abandoned her claim to an annuity for a sum of money, afterwards sought as solicitor for another person to cut down this interest. This was disallowed both as to the solicitor and as to his partner;

(1) 19 Ves. Jun. 261; 8. C. Coop., 80. (2) 6 L. J., Eq., 113.

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and the Court prohibited the disclosure to the plaintiff of any communication received in confidence from the former client. The Vice-Chancellor in this case would not allow a solicitor to act for other parties, in order, by his own personal knowledge of the transaction, to destroy that very agreement which he had been effecting for his client. In the case of *Brady* v. *Lawless*(1), a solicitor had been employed by the guardian of a female infant to file a bill on her behalf. In this a particular charge on the property in favour of another client of the solicitor was denied, but eventually it was admitted. The young lady having married, her husband stopped the proceedings in Chancery; and when the solicitor afterwards came forward with a bill to enforce the charge of his other client, he was restrained from acting, and his client from retaining him in that litigation. In another case reported in the same volume, *Biggs* v. *Head*(2), a solicitor filed a bill for a creditor of a deceased client of his own. In this he set forth part of the contents of a document which he had recommended the deceased to keep secret. The Court would not permit him to act, and it prohibited his disclosing any matters confidentially communicated to him, whether material or not. In *Beer* v. *Ward*(3), the same principle was recognised by Lord Eldon as applicable to a clerk who afterwards goes into business for himself; and in *Bricheno* v. *Thorp*(4) his Lordship says that "a gentleman going into business for himself must not carry into it the secrets of his master."

There can be no doubt, on a consideration of these cases, that what common probity would suggest is also in this matter recognized law. The Bar in England has allowed to itself a greater license; and in the case of *Baylis* v. *Martin*(5) Sir C. Pepys, M. R., declined to interfere in a case wherein a barrister, who had acted for the defendants, was on his promotion to the rank of King's counsel presented with a retainer for the plaintiff which he accepted. The question in such a case is complicated by the theory—however practice may fail to conform to it—of a counsel's services being gratuitous, and his *honorarium* a mere token of the client's gratitude and appreciation. In *Kennedy* v. *Brown*(6) Erle, C. J., insists that the "relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation"—a principle, which, with all possible respect for the learned Judge, was, I think, carried further in that case than in the Roman law, which undoubtedly gave effect to securities passed after the close of a cause by way of remuneration to an advocate. But a contract being thus legally impossible, neither party can on ordinary principles be legally bound; and through the practical impossibility of showing in many cases how a counsel is acting in bad faith without disclosing or pointing attention to the very matters which it is most essential to keep secret, the barrister must in this as in other matters often be left to the guidance of that sense of duty which Erle, C.J., thought would preserve its sensitiveness more unimpaired the less it was affected by any idea of legal obligation. Impossible, however, as it may be to enforce in such instances all that honour might prescribe, the principle laid down by Lord Eldon

(1) Sausse & Sc., 365.
(2) Sausse & Sc., 335.
(3) Jac., 77.
(4) Jac., 300, at p. 302.
(5) 4 L. J., Ch., 73.
(6) 33 L. J., C. P. at p. 143.

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in *Cholmondeley* v *Clinton*(1) seems the correct one It was urged that a counsel, who had advised on pleadings and evidence, might afterwards take a retainer on the other side, and was even bound to take it, unless barred by a previous subsisting retainer On this, Lord Eldon says "I do not admit, that he is bound to accept the new brief My opinion is that he ought not to accept the new brief, if he knows anything that may be prejudicial to the former client, though that client refused to retain him" A client who has taken confidential advice ought not to be obliged whenever he goes to law again to retain the barrister whom he consulted on pain of having his previous confidences turned against him. Let the case, however stand as it may with regard to the English Bar, there is nothing to impede the application of a sound principle here A pleader in this province is bound by a contract to his client; a position, which, I must say, I think, is one in no way less honourable than the fictitious independence of the barrister, and one quite as much calling for a delicate sense of probity Fulfilling the duties both of solicitor and of counsel, the pleader is liable to every obligation, necessarily induced by those duties, that attaches either to the one or the other These obligations cannot be frittered away by any subtleties, and the first of them is the maintenance of an honourable fidelity, whether the pleader be further retained by the same party or not.

In applying the principles that I have dwelt on to actual cases, the English Courts have always required, as a ground of interference, something more than a more hypothetical suggestion of possible injury to the former client In *Brichens* v. *Thorp*(2) Lord Eldon, after making the remark as to an articled clerk setting up for himself, which I have already quoted, proceeds "On the other hand, I think it my duty to take care that he may not be prevented from engaging in any business that he may fairly and honourably take." He then required that it should be pointed out to him, upon the papers in the case in what way the employment of the former clerk would be prejudicial to his former master's client, and this not being done he declined to interfere "There are general allegations," he said, "but nothing particular is stated; unless that is done, I cannot go the length of making this order" In *Beer* v. *Ward*(3) he had said "If it is desired that he should be restrained from making communications to individuals, you must show me what has been done; for I could not interfere to restrain, in this case, any more than in cases of waste, unless something has been done which ought not to have been done" He would not assume, without some cogent proof, that any breach of duty was intended or probable. In the case of *Grissell* v *Peto*(4) the Court of Common Pleas went still further Solicitors acted in a Chancery suit for A and B B as it appeared on the affidavits not being really interested. Afterwards they acted as attorneys for B in an action against him by A It was sought to restrain them, but Tindal, C J, said "Without any allegation of misconduct, the application for the interference of the Court is at least premature. And it could not be of any great advantage to the plaintiff if another attorney were named for the defendant, since nothing could prevent his present attorneys

(1) 19 Ves Jun, 261 at p 275
(2) Jac 390 at pp. 392, 394
(3) Jac 77 at p 80
(4) 9 Bing 1 at p 3,

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from communicating the knowledge they possess" The force of this last *dictum* has not been admitted by the Court of Equity in more recent cases. Their procedure makes it possible pretty often to determine with proximate certainty whether there has been any improper communication or not, and in *Bigge* v. *Heaul*(1) the Court said it would not permit a solicitor to reveal confidential communications, and would not speculate about their materiality. But it is clear that the possession of secrets which may be unfairly made use of, as well as a probable intention thus to make use of them, must be satisfactorily made out as a ground for an inhibition. In *Johnson* v. *Marriott*(2) an attorney who had been employed by a bankrupt's assignees after his dismissal by them became the attorney of a person against whom they had brought an action. It was sought to restrain him, as he had "taken the opinion of counsel on all the facts of the case" This was supported by the affidavits of the new attorney and his clerk. His answer was that the case for counsel "had been drawn up by a former solicitor, and that he was not further acquainted with the facts of the case than could be gathered from the declaration, or than an indifferent person." In his judgment, Bayley, B, says: "The principal ground of my judgment, in this case, is, that the client makes no affidavit. The attorney, here, was originally concerned for the assignees, who can tell whether they made any confidential communications, and whether they would be prejudicial. They neither of them join in any affidavit; and it is not sworn, that they ever made any communications essential to keep concealed, nor, if they did, is any reason assigned for their not making an affidavit. If the assignees had stated that they had made communications of essential importance, which, if disclosed to the other party, might be prejudicial to the suit, I should have paused before I said, that this rule ought to be discharged, and Mr. Jay be permitted to act; but, when the present attorney and his clerk alone make affidavits, and their testimony depends upon the bill of costs, I am of opinion, that the materials are not sufficiently strong to induce the Court to restrain Mr. Jay from acting." Holland, B., concurred; and Gurney B., added: "The party who makes an application of this kind, ought to lay a foundation for our interference in his affidavits."

The general result is that a solicitor, and, therefore, a pleader, after his dismissal without misconduct on his part, or after the close of the business, is at liberty to take sides against his former employer, provided always that he has no secrets to carry with him that can be used to his former client's prejudice. The Court will require a strong case to be made out as a ground for an order restraining a pleader from acting in any particular case, but from the nature of the thing it will, in general, be satisfied with an affidavit of a person who says he made confidential communications pertinent to the now pending suit, without requiring him to go into details, the statement of which would be a disclosure of the very matters which it is his purpose to keep concealed. The mere appearing in Court on successive occasions to support opposite views, however much it may weaken a pleader's advocacy, is not a breach of any rule that a Court could enforce. It

(1) Sausse & Sc., 335. (2) 3 L. J., Ex., 40, p. 4

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is a question for the advocate's own delicacy and self-respect, and with these the Court has nothing to do.

I have not been able to discover any case in which the question of a change of sides in a criminal cause has been considered; in the absence of such cases it is to be assumed that the same general principles apply as in civil suits, with such modifications as may arise from the consideration that the Crown in prosecuting one accused of a crime desires only that truth may be ascertained; the success of the prosecution being by comparison of no moment at all. This purpose of a criminal proceeding and the peculiar duties which it imposes on the counsel for the Crown, as distinguished from those of the prisoner's counsel representing a man anxious only for acquittal, are well discussed in Mr. Fitzjames Stephens' View of the Criminal Law of England, pp. 166, 167. In a case of two or three persons about to be tried separately upon the same set of facts, an advocate retained for the Crown in the first trial could not properly during its pendency take a brief for the prisoner in the second. To do so, would necessarily prevent his doing complete justice to either client. If a brief for B. were offered to him after the close of the trial of A., his acceptance or refusal of it should, I apprehend, be determined by the circumstance of whether as counsel against A. he had learned any matter confidentially which he could now use in the interest of B. If he had, he ought to refuse the brief, from which he would speak with an unfair advantage. So, also, if first engaged for one of the prisoners and then offered a brief for the Crown. Many other cases might be put, but the solution of them all seems to depend on this, that a counsel must not use any knowledge gained in consultation for a legal end, in a way, which, if anticipated, would certainly have prevented its communication.

In the case now before the Court, the Mohánas, formerly defended by Messrs. *Leggett*, *Dayárám*, and *Oodárám*, have not themselves made any affidavits. To the unsworn statements drafted for them the Court can pay no attention. Those documents ought not to have been appended to Captain Crawford's own affidavit. In the latter it is said these Mohánas declared that "they were afraid for their lives if they complained against the vakils;" but they have had abundant and recent proof of the power of the law to protect them, and I cannot suppose that they would feel any terror in telling the truth under the patronage of the Superintendent of Police. If their moral fibre is indeed so feeble, what value could be attached to their affidavits even if they had made them, much more to any loose statement by which they may possibly have misled Captain Crawford into his present complaint. I must assume that they have nothing material to tell; a circumstance which itself weighs strongly against the application.

From Captain Crawford's affidavit it appears that Bezonji, late Town Inspector of Karáchi, took these Mohánas into custody and sent them for trial on a charge of taking part in the dishonest disposal of stolen property. They were acquitted, their pleaders being Messrs. *Leggett*, *Dayárám*, and *Oodárám*. Their accuser Goka and his servant Bucho were then charged, and partly on the evidence of the Mohánas convicted of receiving stolen property. Bezonji is now accused of having given false evidence in the second trial and with having maliciously

instituted the proceedings in the first. The question is whether Messrs. *Leggett*, *Daydrám*, and *Ooddrám* can properly be restrained from defending him on either of these accusations. It is obvious that the Mohánas, if called as witnesses against Bezonji, may be cross-examined on his behalf in a way intended to elicit from them statements quite inconsistent with the line of defence once taken for them by the same pleaders The pleaders themselves may, in the interest of their new client, have to urge that the account formerly given by the Mohánas and adopted by themselves of the transactions connected with the stolen property was not true. All this, however, the pleaders may do, not perhaps without some damage to their advocacy, but without any breach of duty to their former clients, unless by having learned in confidence from those clients matters not accessible to the public generally, and by endeavouring to use this knowledge unfairly, so as to force them to disclose what they formerly communicated, they infringe upon a well-recognised principle. To the prosecution they are under no direct obligation, since they were not retained for the Crown in the previous proceedings; and on the theory of criminal trials being intended to elicit the whole truth, whether favourable to a conviction or an acquittal, no objection could be raised by a prosecuting officer to any disclosure that they might be in a position to extract from the Mohánas.

When, however, I compare the affidavits laid before the Court, I do not find that Captain Crawford has stated that any confidential communications were made by the Mohánas to the pleaders which can give the latter an unfair advantage in conducting the defence of the accused Bezonji. He could not indeed depose of his own knowledge to such communications; for his presence, when they were made, would have deprived them of their privileged character. Messrs. *Leggett*, *Daydrám*, and *Ooddrám*, on the other hand, depose in the strongest possible terms that they are in possession of no secrets of the Mohánas at all, that their knowledge extends no further than the proceedings held in open Court and depositions accessible to all. These statements are above all suspicion; and as they remove all grounds for the apprehension or possibility of any breach of confidence, I cannot hamper the freedom of action of these gentlemen by any expression of opinion unfavourable to their taking up the defence of the accused Bezonji on either or both of the charges preferred against him. It is a matter within their own discretion. In a conversation between Captain Crawford and Mr. Leggett some warm words seem to have passed, from which the former understood Mr. Leggett to say that he was aware of a fraud on the part of the Mohánas and would use that knowledge against them. Mr. Leggett thinking that it was sought to put an improper pressure upon him says he put the case as a purely hypothetical one. It is not necessary that I should dwell further on what was probably a misunderstanding. What passed could not affect Mr. Leggett's duties or rights in relation to his clients, though it might account for the course taken by Captain Crawford in complaining to this Court. That complaint was, no doubt, dictated simply by a sense of public duty, but it has been fairly, and, for the purpose in hand, completely met. No breach of duty has yet occurred, none at all is inevitable. If any should take place, the Court will be ready to take proper notice of it; its duty for the present is discharged by its declining to interfere.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

1887. *July* 13.

FULCHAND, (DECREE-HOLDER), APPELLANT, *v.* RAT ICHHA', (JUDGMENT-DEBTOR), RESPONDENT.*

Court Fees Act VII of 1870, *Sec.* 11—*Execution of part of decree—Payment of full amount of Court fees not necessary for such part execution—Construction.*

The plaintiff sued the defendant to recover possession of a house and for mesne profits. In the same suit he also claimed certain account books and documents from the defendant In paying Court fees he estimated the mesne profits at Rs. 151, and paid in that amount. He obtained a decree, and the amount of mesne profits awarded to him was Rs. 3,349-13-3. The decree further directed that possession of the house should be given to him, and that the books and documents should be handed over to him. He now applied for execution of that part of the decree which directed the delivery of the house and of the account books and other documents. The defendant contended that, under section 11 of the Court Fees Act VII of 1870, the plaintiff was not entitled to execution of any part of the decree until he paid the proper Court fees on the sum awarded as mesne profits, *viz.*, Rs. 3,349-13 3.

Held, that the plaintiff might obtain execution of that part of the decree which ordered delivery of the house and books and documents without paying the fees payable on the amount awarded for mesne profits. Section 11 and section 17 of the Court Fees Act VII of 1870 ought to be similarly construed; and the language of the latter section, which deals with multifarious suits, shows that for the purposes of the stamp revenue such suits are deemed to be a collection of distinct suits relating to the several causes of action combined in them. In applying section 11 to such suits, in order to give a harmonious construction to the Act as a whole, the term "suit" in that section should be construed as confined to that part of the suit in question which related to mesne profits.

THIS was an appeal from an order made by Khán Bahádur E. M. Mody, First Class Subordinate Judge of Surat, in *darkhást* No. 536 of 1885.

The plaintiff (appellant) sued the defendant (respondent) to recover possession of a house and for mesne profits. In the same suit he also claimed certain account books and documents from the defendant. In paying Court fees he estimated the mesne profits at Rs. 151, and paid in that amount. He obtained a decree, and the amount of mesne profits awarded to him was Rs. 3,349-13-3. The decree also directed that possession of the

* Appeal No. 25 of 1886.

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house should be given to him, and that the books and documents should be handed over to him.

He now applied for execution of that part of the decree which related to the delivery of the account books and other documents and of the house.

The respondent contended *(inter alia)* that, unless the appellant paid full Court fees on Rs. 3,349-13-3, the amount of mesne profits awarded by the decree, he could not obtain execution of any part of the decree.

The Subordinate Judge allowed the respondent's contention, and rejected the appellant's application for execution.

From this order the appellant appealed to the High Court.

K. T. Telang (*Motilál M. Munshi* with him) for the appellant:—The claims dealt with by the decree were distinct and separate, and execution may issue as to part without payment of Court fees on the whole amount awarded by the decree: see *In re Manohar G. Tambekar*[1]. The cases contemplated by section 11 of the Court Fees Act VII of 1870 are cases of suits which are exclusively for mesne profits. At all events, the section is not clear upon the point, and the Court Fees Act being a fiscal enactment it should be construed in favour of the subject.

Macpherson, (Acting Advocate General), and *Mánekshán Jehángirshán* for the respondent:—The terms of section 11 of the Court Fees Act admit of no doubt. The decree is to be regarded as a whole, and, therefore, before the appellant can seek execution, he must pay the whole Court fee due on the amount of the profits awarded by the decree. There are no distributive words in section 11, and it cannot, therefore, be construed to contemplate fractions of a decree. There has been one suit and one decree, and that was mainly for mesne profits, although minor claims were also included.

SARGENT, C. J.:—This appeal raises a question as to the proper construction of section 11 of Act VII of 1870. It has been contended that, as the plaintiff has not paid the proper fee on the

(1) I. L. R., 4 Bom., 26.

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sum of Rs. 3,949-14-3, the amount of the mesne profits as found in his favour, he cannot execute the rest of the decree, which relates to the delivery of the documents lodged in Court and of possession of the house. It is said that the "decree," the execution of which is prohibited by the section until the proper Court fee is paid, is the whole decree, and not such part of it as relates merely to the mesne profits. The language of section 17, which deals with multifarious suits, shows that, for the purposes of the stamp revenue, such suits are deemed to be a collection of distinct suits relating to the several causes of action combined in them. And we think that in applying section 11 to such suits, we ought, in order to give an harmonious construction to the Act as a whole, to construe the term "suit" in that section as confined to that part of the suit in question which relates to mesne profits. Strictly speaking, a suit on several causes of action, including mesne profits, is not a suit for mesne profits, which, according to its ordinary and more obvious meaning, would be understood as one exclusively for mesne profits. Moreover, as the Act is a fiscal Act, it is to be construed in favour of the subject. And any other view of section 11 would certainly be a harsh one, and not to be accepted in the absence of a very clear expression of such intention on the part of the Legislature. The decision in *In re Manohar G. Tambekar*[1] on the analogous question raised by article 5 of Schedule I proceeds on the same view of the Act.

We must, therefore, discharge the order of the Subordinate Judge; and as counsel for the defendant admits that he has no objection to urge, on the merits, to the execution of the decree, order that the documents lodged in Court be delivered to the plaintiff, and that possession be given to him of the house mentioned in the *darkhást*.

(1) I. L. R., 4 Bom., 26.

APPELLATE CIVIL.

Before Sir Charles Sargent Kt , Chief Justice, and Mr Justice Nanabhai Haridas

KHURSHETBIBI AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, v KASO VINAYEK, (ORIGINAL PLAINTIFF), RESPONDENT * 1887, *August* 1

Decree—Execution—Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution proceedings

K a Mahomedan woman who was a co sharer in a certain *khoti vatan*, died indebted and was sued after her death as 'represented by her minor son represented by his guardian" A decree having been obtained against K thus represented, her share in the *khoti* was put up for sale in execution, and was purchased by the plaintiff who obtained a sale certificate reciting that the right title, and interest of K in the said *khoti* had been purchased by him. He now sued the defendants, who were K s co sharers in the *khoti*, to recover the profits of K. s share which they had received

K , besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution proceedings and the defendants contended that her share in her mother s estate had not passed to the plaintiff.

Held, that the plaintiff was entitled to the whole of K s share The debt due by K was one for which the daughter was equally responsible, and having regard to the form of the suit and the execution proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of K s share, and would acquire a title unimpeachable by the daughter

THIS was a reference by H Batty, Acting District Judge of Thána under section 617 of the Civil Procedure Code (Act XIV) of 1882

One Khatiza was a co-owner with the defendants of a certain *khoti vatan* After K. s death a creditor of hers sued upon a bond executed by her and obtained a decree against "Khatiza, deceased, represented by her minor son represented by his guardian."

In execution of this decree, Khatiza's share in the *khoti* was put up for sale and purchased by the plaintiff, who obtained a sale certificate purporting to convey to him the right, title, and interest of Khatiza in the *khoti*

The plaintiff sued the defendants, (the co-sharers of the *khoti*), to recover Khatiza's share of the profits which had been collected by them.

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Khatiza had left a daughter, who had not been made a party to the suit, or to the subsequent execution proceedings, and the defendants contended that the plaintiff's purchase did not affect her share.

The District Judge referred the following question to the High Court :—

"Whether defendants are entitled to withhold the daughter's share, on the ground that it has not passed to plaintiff under the certificate, the defendants not representing the daughter and having no title to her share which they have collected."

Dáji Abáji Khare for the defendants :—By his purchase the plaintiff got only the minor son's interest in the property. The whole estate could not be represented by the son, the other heirs being left out—*Hendry* v *Mutty Lall Dhur*(1); *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh*(2). The heirs of the judgment-debtor are Mahomedans, and each one of them is in his own right, and one person alone is incapable of representing the others.

Ráv Sáheb *Vásudev Jaggannáth Kirtikar* for the plaintiff :—The certificate of sale clearly recited that Khatiza's entire share was sold, and the purchaser must be deemed to have bidden for and purchased that, and acquired an unimpeachable title: see *Ishan Chander Mitter* v. *Buksh Ali Soudagur*(3), which has been followed in *Jairám Bajabáshet* v. *Jomá Kondia*(4). The debt was a good debt, and the daughter was bound to pay it. Moreover, the defendants, who are strangers, cannot plead this defence.

SARGENT, C. J. :—The plaintiff was the purchaser at auction sale in execution of a decree on a bond against "Khatiza, deceased, represented by her minor son represented by his guardian." The certificate of sale purports to convey to the plaintiff, in execution of the above decree, the thereunder written property in possession of Sharifabibi, grandmother and guardian of the minor—the property being subsequently described as the right, title, and interest of Khatizabibi, described as the deceased defendant, in the 3 annas 6 pies' share in the *khoti*. As no part of the produce

(1) I. L. R., 2 Calc., 395.
(2) I. L. R., 4 Calc., 142.
(3) Marsh. Rep., 614.
(4) I. L. R., 11 Bom., 361.

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of the *khoti* was in actual possession of either of the heirs of the deceased Khatizabibi, the latter part of the description of the property may, we think, having regard to the form of the suit, be disregarded as *falsa demonstratio*, and not as intended to restrict the property sold to the minor's share. The purchaser would, therefore, be justified in assuming that he was bidding for the entirety of Khatizabibi's share in the *khoti*, and (on the principle established by the case of *Ishan Chander Mitter* v. *Buksh Ali Soudagur*(1), which was acted upon by this Court in *Jairám Bajabáshet* v. *Jomá Kondia*(2),) would acquire a title unimpeachable by the daughter, who was equally responsible for the debt, on any other ground than that the debt was not due. As there was no suggestion that this was the case, we think the defendants could not justify their refusal to pay the whole 3 annas 6 pies' share in the produce of the *khoti*, on the mere technical ground that the daughter had not been made a party to the original suit.

(1) Marsh. Rep., 614. (2) I. L. R., 11 Bom., 361.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Nánábhái Haridás, and Mr. Justice, Birdwood.

IN *RE* KARA'CHI MUNICIPALITY.*

1887. *August* 2.

Stamp Act I of 1879, *Sch. I, Art.* 52—*Tax—Receipt for money paid as taxes—Municipality, receipt by, for house tax exceeding twenty rupees—Receipt stamp necessary.*

A receipt by a municipality acknowledging payment of house-tax exceeding twenty rupees, requires a receipt stamp under Schedule I, Art. 52 of Act I of 1879.

THIS was a reference by H. N. B. Erskine, Esq., Commissioner in Sind, under section 46 of the Indian Stamp Act I of 1879.

The secretary of the Municipality of Karáchi having given a receipt to a tax-payer for a sum of Rs. 56-11-0 paid by him on account of house-tax, the question was raised whether under the

*Civil Reference, No. 36 of 1886.

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IN RE KARÁCHI MUNICIPALITY.

Stamp Act I of 1879 such a receipt required a receipt stamp. The matter was laid before the Collector, and by him referred to the Commissioner, who referred the following question to the High Court:—

Whether a receipt granted on behalf of a municipal body acknowledging receipt of monies paid in satisfaction of municipal taxes, the amount paid being over rupees twenty, requires a receipt stamp.

The opinion of the Commissioner was that it should not bear a receipt stamp.

Ráv Sáheb *V. N. Mandlik* for Government:—The receipt is not exempt from stamp duty. The municipality has done something for which it is remunerated, and the payment by the tax-payer is for a consideration. It is not gratuitous or "without consideration," as contemplated by Schedule II, art. 15 (*b*). The case of *In the matter of the Uncovenanted Service Bank*(1), though under the old Stamp Act, applies here.

There was no appearance for the other party.

PER CURIAM:—We think the question referred to us must be answered in the affirmative. The receipt sent up with the reference is one for the payment of money "the amount of which exceeds twenty rupees." It is, therefore, an instrument requiring a stamp under Act I, 1879, Schedule I, art. 52, unless it comes under Schedule II, art. 15 (*b*). That article exempts from stamp duty a receipt for payment of money "without consideration." The exemption was intended apparently to apply to receipts for "voluntary" payments, which in the ordinary legal acceptation of the term are payments without consideration, such as payments made merely in consideration of natural love or affection or mere gifts. The receipt in question is one for payment of house rate due to the municipality under the Act constituting the municipality. The payment is not gratuitous, but one in satisfaction or discharge of a legal obligation imposed by the Act, and in order to relieve the payer from the consequence which would ensue in case of his committing default, and is, therefore, not one without "consideration."

(1) I. L. R., 4 Calc., 829.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

HANMANT RA'MCHANDRA, MINOR, BY HIS GUARDIAN, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIMA'CHA'RYA, (ORIGINAL DEFENDANT), RESPONDENT.*

1887. *August* 2.

Hindu law—Adoption during wife's pregnancy—Posthumous son, rights of, in family property—Will limiting legal share of such son.

The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him, does not invalidate the adoption.

A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law, than with the right of a son *in esse* at the time of his death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born.

R. died, leaving him surviving his widow, who was then pregnant, and the defendant whom he had adopted a few days before his death. By his will, R. directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after R.'s death a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid, having taken place during the pregnancy of the plaintiff's mother, and that R.'s will, in so far as it was in prejudice of the plaintiff's rights as a son, was also invalid.

Held, that the adoption of the defendant by R. was valid, notwithstanding that R.'s wife was pregnant at the time of the adoption.

Held, also, that R.'s will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son, taking the other three-fourths.

THIS was an appeal from a decision of Ráv Bahádur G. V. Bhánap, First Class Subordinate Judge of Kárwár.

Rámchandra died in February, 1882, leaving him surviving his widow, who was then pregnant, and the defendant, whom he had adopted three or four days before his death. By his will

*Appeal No. 108 of 1884.

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Rámchandra directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after Rámchandra's death the plaintiff was born. The present suit was brought by the guardian of the plaintiff, who was still a minor, to recover possession of the property from the defendant.

It was contended *(inter alia)* for the plaintiff that the defendant's adoption was invalid, having taken place during the pregnancy of Rámchandra's wife, the mother of the plaintiff, and that the will, so far as it purported to dispose of the property to the prejudice of the plaintiff's right, was also invalid.

The Subordinate Judge awarded the plaintiff half of the property as given by the will, and dismissed the remainder of his claim.

The plaintiff appealed to the High Court.

Pándurang Balibhadra for the appellant:—Rámchandra had no power to adopt during the pregnancy of his wife—West and Bühler's Hindu Law (3rd ed.), p. 905. Adoption is to be effected only when the possibility of having a son is extinct. The term "children" includes a child in the womb. The membership in a family commences with the conception: see West and Bühler, p. 803; *Jottendromohuni Tágore* v. *Ganendromohun Tágore*[1]. During the pregnancy of the wife even partition is not to be effected: see Strange's Hindu Law, 182; West and Bühler, p. 703. The lower Court was wrong in awarding half of the property to the plaintiff. A father cannot by his will limit the right of his son in existence at the time of his death, and the same rule must apply to a posthumous son. The plaintiff is entitled, under the law, to three-fourths and the defendant to only one-fourth should the adoption of the defendant be held valid.

Shámráv Vithal for the respondent:—The document, under which the property has been given to the defendant, is not a will, but it is an absolute gift, possession having completed it. Actual birth is necessary to constitute a son entitling him to the

(1) L. R. Ind. Ap. Supl. Vol., 47.

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son's rights. The word *janma* does not carry with it the idea of mere conception, but means actual birth: see West and Buhler, pp. 65 and 67. It is at birth that the son acquires rights to his father's property—*Yekeyamian* v. *Agniswarian*(1). The Hindu law does not prevent a person from adopting during the pregnancy of his wife, and an adoption during the pregnancy has been held valid: see *Nagabhushanam* v. *Sheshammagaru*(2). The defendant's adoption, therefore, was valid, and the decree of the lower Court should be upheld.

SARGENT, C.J.:—This is a suit by the guardian of the posthumous son of one Rámchandra Shesho to recover possession of the family property from the first defendant, Bhimácharya, who claimed to have been adopted by Rámchandra two days before his death, and to be entitled, under his will, to share equally with the minor plaintiff. The Subordinate Judge has found the adoption proved, and that its validity is unimpeachable.

The *factum* of the adoption has not been disputed before us; but it is contended that it was invalid, owing to the undisputed circumstance of Rámchandra's wife being pregnant at the time it took place. The question raised by this contention was considered by the Madras High Court in *Nagabhushanam* v. *Seshammagaru*(3), and decided in favour of the validity of an adoption during the pregnancy of the wife. It is pointed out in that case that there is no authority in the Hindu law books for holding that an adoption is only permissible when the adopting party is hopeless of having issue. In the Dattaka Chandrika, sec. 1, pa. 4, it is said "by one destitute of a son," and sec. 2, pa. 1, "by one having no male issue" is a son to be adopted.

It may doubtless be contended that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legiti-

(1) 4 Mad. H. C. Rep., 307. (2) I. L. R., 3 Mad., 180.
(3) I. L. R., 3 Mad., 180, at p. 184.

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mate son. A man in bad health or on his deathbed, as in the present case, might not live till the child was born ; and yet, if the rule be as contended for by the appellant, the suspension must *ipso facto* take place in all cases during pregnancy: for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy.

The rights of a child in the womb are doubtless much regarded by the law, as in the case of inheritance and partition; but, as pointed out by the Madras Court, if the doctrine of suspension of the power of adoption during pregnancy "be carried to its legitimate conclusions, and the validity of the exercise of the power be made to depend on an event which may not be known, it follows that an element of uncertainty is introduced into an act regarded as highly religious." In Steel's Hindu Customs it is said that the duty to adopt does not arise until the birth of a son becomes very improbable, by which, we think, must be meant, having regard to the religious importance attaching to the act when there is considerable risk of the adopter dying sonless, which is certainly the case when a man is on his deathbed although his wife may be actually pregnant at the time. We think, therefore, that the Subordinate Judge was right in holding that the defendant's adoption was a valid one.

Independently of the question as to the effect of Rámchandra's will, the defendant would, by general Hindu law, have been entitled to only one-fourth of his adoptive father's estate on the birth of the minor plaintiff. By that will the estate was divided equally between the two sons, and it is contended for the defendant that Rámchandra was competent to make this provision by will, because there was no natural son in actual existence at the time of his death. It is doubtless true that it is by actual birth the son acquires, according to the Mitákshara law, a right of co-proprietorship with the father in the ancestral property. But a posthumous son has certain rights by the Hindu law which it is necessary to consider. A child, who is in its mother's womb at the time of its father's death, is, for the purposes of inheritance, deemed to be *in esse*; and, as regards partition, a child, if begotten

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at the time, is, as pointed out by Sir Barnes Peacock in *Kallidás Dás* v. *Krishan Chandra Dás*[1], in point of law, in existence at the time of the partition, and entitled to share with the other sons or brothers. This distinction between a son *in utero* at the time of partition and one who is subsequently begotten and who is only entitled to his father's self-acquired property and separated share, is clearly pointed out by Sir T. Strange's Hindu Law, p. 182, and Dr Jolly's Tágore Lectures, p. 132. The former says: "When pregnancy is apparent at the time, either the partition should wait, or a share be set apart, to abide the event; but that, if it were then neither manifest, nor apprehended, in such case, should a son who was at the time in the womb be born after, he should obtain his share from his brothers by contribution, while a subsequently begotten one shall have recourse only to the remaining property of the father." So far, therefore, a posthumous son has equal rights with a son actually born.

But the present case raises the more difficult question, and which, as far as we can discover, is clear of authority, as to whether his right by survivorship is identical with that of a son *in esse* when in conflict with a testamentary provision by his father. Mr. Mayne in his Hindu Law lays it down as well established by the decisions of all the High Courts that "the right of devise is co-extensive with that of alienation, except when in an undivided family the right of devise conflicts with the law of survivorship, in which case the former gives way." The judgments of this Court in *Narotlam Jugjiwan* v. *Narsandás Harikisandás*[2] and *Vásudevbhat* v. *Venkatesh Sanbhav*[3] support this view. The question, therefore, arises whether the right of the posthumous son by survivorship stands on the same footing with regard to the father's testamentary power. It is to be remarked that this is a distinct question from the father's power of alienation during his life as against a son who was only begotten at the time, which is the case in *Musst. Gowra Chowdhrain* v. *Chumnun Chowdry*[4] referred to by the Subordinate Judge. The right of the posthumous son by survivorship, on the prin-

(1) 2 Beng. L. R., 103, F. B Rul.
(2) Bom. H. C. Rep., A. C. J., 6.
(3) 10 Bom. H C. Rep., 139.
(4) C. W. R. for 1864. p. 340.

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ciple of relation back to the time of the father's death, which obtains in the analogous cases of inheritance and partition, would stand on the same footing as that of the son *in esse* at the time of the father's death, and a due regard to the harmony of the law under analogous circumstances justifies, we think, the conclusion that a father can no more interfere by his will with the right of a posthumous son to his share in his family property as fixed by law, than in the case of a son *in esse* at the time of his death, and if this be so between the posthumous and other natural born sons, it must also obtain between the posthumous son and an adopted son who stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born. We have, therefore, come to be conclusion that in the present case Rámchandra's will was inoperative so far as it reduced the plaintiff's share to a moiety.

We must, therefore, vary the decree of the Court below, and direct that the plaintiff do recover three-fourths of Rámchandra's property. As to the bonds forming part of the property, the decree must be varied by directing that a receiver be appointed to get in what is due upon the bonds, the proceeds to be divided as above. The decree is further varied by directing that the costs of defendants 2 and 3 be paid out of the estate before division between the plaintiff and the first defendant. The plaintiff to have half his costs of this appeal.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1888. *June* 12.

NA'NA'BHA'I GANPATRA'V DHAIRYAVA'N, (PLAINTIFF), *v.* JANA'RDHAN VA'SUDEV AND RAMA'BA'I, (DEFENDANTS).*

Hindu law—Marriage—Guardianship—Custody - Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.

The plaintiff and Ramábái, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was Ramábái's father, until the year 1880. In 1877 a daughter Sonábái had

* Suit No. 210 of 1886.

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been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife Ramábái to join him with their daughter Sonábái. Ramábái refused, and she and Sonábái continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, Sonábái having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter Sonábái from the defendants, who, however, refused to deliver the girl to the plaintiff. In May, 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter Sonábái married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a *rule nisi* for an injunction against the defendants.

Held that, pending the hearing of this suit, he was entitled to the injunction asked for.

THE plaintiff was the husband of the second defendant, who was the daughter of the first defendant, and he sued to recover possession of his (the plaintiff's) daughter Sonábái, and to restrain the defendants from having her married without his assent.

The plaint stated that the plaintiff and the defendants belonged to the Prabhu caste of Hindus in Bombay, and the plaintiff had married the second defendant in or about the year 1869. The only issue of that marriage had been a daughter, named Sonábái, who was born in November, 1877, and was, therefore, at the date of this suit about nine years of age.

Prior to the year 1880 the plaintiff had been living with his wife and her father in the house belonging to the latter, but in that year he ceased to reside there, and went to live elsewhere. His wife, (the second defendant), subsequently refused to live with him, and in consequence he married a second wife in June, 1884, and since that time resided with her in his father's house.

In December, 1885, the plaintiff through his solicitors addressed a letter to the defendants, calling upon them to hand over to the plaintiff his daughter Sonábái, and stating that he proposed to give her away in marriage during the then approaching marriage season. The defendants declined to give up the child.

The plaintiff complained that the defendants had been endeavouring to contract a marriage for his daughter Sonábái

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without his consent, and that, having failed to obtain a husband for her, they now, (as he was informed), proposed to give her in marriage to a son of the deceased sister of Ramábái, (the second defendant), *viz.*, one Anandráv Dádáji, without the consent of the plaintiff, and that the said marriage was to be celebrated very soon. The plaintiff stated that he was not willing that the proposed marriage should take place; and he alleged that it was contrary to the custom and usage of the Prabhu community, and that the defendants had no right to give his daughter in marriage to any person without his consent. He further submitted that he alone was entitled to have the custody and guardianship of his daughter, and that he was willing to receive the second defendant into his house, and to live with her as his lawful wife, in case she was desirous of accompanying Sonábái to his residence.

He prayed that it might be declared that he, as father and natural guardian of Sonábái, was entitled to her custody, and that the defendants might be restrained from marrying her to any person without his consent.

The plaintiff filed this suit on the 13th May, 1886, and on the same day obtained a *rule nisi* for an injunction, calling on the defendants to show cause why they should not be restrained from solemnizing the marriage of Sonábái with Anandráv Dádáji, or with any other person, without the plaintiff's assent thereto.

In their affidavits the defendants stated that the plaintiff in the year 1880 had been convicted of theft, and had been sentenced to imprisonment for two years; that since his discharge from prison he had been in destitute circumstances, and incapable of maintaining his wife and daughter, who had, consequently, resided with and been maintained by the first defendant. They contended that no respectable person would negotiate with the plaintiff for the purpose of getting his daughter in marriage; and that this was the reason of their refusal, in 1885, to give up the girl to the plaintiff. They further set forth that there was very great difficulty experienced by members of their caste in finding eligible husbands for their daughters, and that very large premiums were often required, and that the plaintiff would be unable to pay

any premium whatever. They submitted that the marriage, which they proposed between Sonábái and Anandráv Dádáji, was, in all respects, a fit and proper marriage, and that it should be forthwith celebrated, as the first defendant, who was an old man, was willing and able to bear all the attendant expenses. They denied that the proposed marriage was contrary to the usage of the Prabhu community. They further stated that the plaintiff was then maintained by his father, being entirely destitute of means, that he was of a profligate character, and unfit to be entrusted with the custody and guardianship of his daughter.

The rule now came on for hearing.

Macpherson, for the defendants, showed cause:—The Court has a discretion in granting or withholding an injunction. This is a case in which the Court ought not to interfere on the application of the plaintiff. He has been convicted of a criminal offence. He has not for years supported his wife Rámábái or his daughter Sonábái, and they have lived with the first defendant. The plaintiff has no means to support them, and is not in a position to negotiate a proper marriage for Sonábái. The defendants are acting solely for the best interests of Sonábái. The plaintiff's only object in this suit is to thwart them. The father's assent is not essential to the validity of his daughter's marriage—Mayne's Hindu Law, paras. 80, 81. If the plaintiff is not entitled to the custody of his child, he should not get this injunction—Simpson on Infants, p. 136 *et seq*; *Ex parte Warner*[1]. As to the marriage proposed by the defendants, the plaintiff states no tangible objection to it. In exercising its discretion, the Court will have regard to the interests of the girl—Specific Relief Act I of 1877, sec. 52, Kerr on Injunctions, (2nd ed.), pp. 3, 5. As to the propriety of the proposed marriage, see Mandlik's Hindu Law, pp. 409, 425, 440.

Starling, for the plaintiff, *contra*:—There is clearly a doubt as to the propriety of the proposed marriage, and the Court will, therefore, grant the injunction. The plaintiff has a legal right to give his daughter in marriage. A good reason must be given before he is deprived of this right. His poverty is no reason;

(1) 4 Brown Ch. Cas., 101.

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nor is the fact that he was some years ago convicted of an offence. There has been no desertion and no abandonment.

14th June. FARRAN, J.:—The parties to this suit are Hindus of the Prabhu caste, and the object of the plaint, as stated in its prayer, is to obtain a declaration (1) that the plaintiff, as the father and natural guardian of his daughter Sonábái, is solely entitled to her custody, and to keep her under his immediate care and protection, (2) that the defendants, or either of them, are or is not entitled to give the said Sonábái in marriage to Anandráv Dádáji, or any other person, without the assent of the plaintiff, and an order that the defendants, or either of them, may be decreed to deliver up the custody of the said Sonábái to the plaintiff. The plaint also prayed that the defendants might be restrained by injunction from solemnizing the intended marriage of the said Sonábái with the said Anandráv Dádáji, or with any other person, without the plaintiff's assent

The facts are practically admitted, and are these.—

In the Christian year 1869 the plaintiff was married to the defendant Ramábái, who is the daughter of the defendant Janárdhan Vásudev. After their marriage the plaintiff and the defendant Ramábái lived together—sometimes in the plaintiff's father's house and sometimes in that of the defendant Janárdhan Vásudev In the year 1877 the defendant Ramábái gave birth to a daughter Sonábái, who is the subject of the present application. Ramábái and the plaintiff were then living in the house of Ramábái's father, and they continued to reside there together until the year 1880.

In that year the plaintiff and his brother were accused by the defendant Janárdhan Vásudev of the theft of certain ornaments, and were, by the Presidency Magistrate, Mr. Náná Moroji, convicted of that offence. The plaintiff was sentenced to two years' rigorous imprisonment. After the expiration of his term of imprisonment the defendant did not return to live with his father-in-law, and probably would not have been permitted to do so, and apparently for some time he did not return to his own father's house, but he eventually did so, and in the year

1884 he requested his wife Ramábái to come and live with him there with their daughter Sonábái. The house of the plaintiff's father was then, as it is now, a very small one, and there were several inmates living therein. The plaintiff was in very poor circumstances—almost, if not altogether, dependent on his father, and Ramábái preferred the ample accommodation and luxurious mode of life afforded to her in her father's house, to taking up her abode with the plaintiff's father in his small and crowded house, and there sharing the poverty and disgrace of the plaintiff. The plaintiff then married a second wife. It is not alleged that the plaintiff ever treated his wife Ramábái, or their daughter, with unkindness. He appears to have been attached to them both. In November, 1885, Sonábái entered upon the ninth year of her age—an age at which it is customary for Prabhus to seek husbands for their daughters, and in December of that year the plaintiff through his solicitors addressed the following letter to his wife Ramábái and her father :—

"Sir and Madam,—Under instructions received from our client, Mr. Nánábhái Ganpatráv Dhairyaván, the son-in-law of you, Janárdhan Vásudevji, and the husband of you, Ramábái, we have to call upon you and each of you to send and deliver over the safe custody of the body of his (our client's) daughter Sonábái, now of the age of eight years, to his house at Parel, No. 36, next to the western gate of the Government House, within four days from the service hereof on you. Our client proposes to give his said daughter away in marriage during the approaching marriage season. In default of compliance with the above requisition therefore our client will be compelled to proceed further in the matter, as he may be advised, at your costs."

The defendants by their letter of the 3rd December declined to accede to that request. The plaintiff in his affidavit of the 12th June, paragraph 7, says that at this time he had secured a husband for Sonábái in the person of one Moreshvar, and refers to the affidavit of Núráyan Vásudev Kirtikar in support of his statement; but I think that, though there may have been some conversation about the matter, no actual negotiations upon the subject were entered into. This particular alliance is not refer-

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red to in the plaintiff's letter of the 2nd of December which I have just read Beyond the writing of that letter the plaintiff took no steps to enforce the return of Sonábái to him until the present proceedings.

The plaint was accepted on the 13th of May last in vacation and on the same day I granted a rule *nisi* and an *interim* injunction restraining the defendants from solemnizing the intended marriage between Sonábái and one Anandráv Dádáji, or any other person, without the plaintiff's assent. I granted that rule upon the affidavit of the plaintiff, which stated as follows:—

"2. I further say that on the 18th instant I received a letter from one Bábáji Cáshináth, the husband of the first daughter of the said defendant Janárdhan Vásudevji, asking me to see him on the subject of the intended marriage of my daughter Sonábái.

"3. On the 11th instant I, in company with my brother, called upon the said Bábáji Cáshináth at his office on the subject of the said letter, when he informed me that my said daughter Sonábái was to be given in marriage to Anandráv Dádáji, and the same was to be solemnized on the 13th instant. I, therefore, strongly protested against such a thing being done without previously having obtained my consent; whereupon the said Bábáji Cáshináth said that the defendant Janárdhan Vásudevji was determined to have it solemnized on the 13th instant.

"4. I further say that, if the defendants above named are not restrained by an *interim* injunction, they will get my said daughter Sonábái married, and I will be permanently deprived of my right as her natural father and guardian."

Cause was shown by the defendants against that rule on the 12th instant by Mr. Macpherson on behalf of the defendants; while Mr. Starling, for the plaintiff, urged that it should be continued until the hearing. The question I have to determine is, whether that injunction should now be dissolved, or whether it should be made absolute until the suit comes on for final decision.

I have given the matter anxious consideration, because its decision, even at this stage, is fraught with important consequences to the parties and to the girl Sonábái. On behalf of

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the plaintiff it is said that, if I dissolve the injunction, the defendants will without his consent at once marry his daughter to her cousin Anandráv Dádáji, and that he will be for ever deprived of his right, as a father, to marry his daughter Sonábái to a husband of his own choice, and that Sonábái will be for ever united to a husband of whom he, the plaintiff, does not approve. The discharge of the rule will, therefore, operate as a decision of the suit, and the plaintiff will be deprived of his right to appeal, a marriage performed under such circumstances being final—*Bái Rulyat* v. *Jeychund Kewul* (1).

On behalf of the defendants it is urged that Sonábái is now in the ninth year of her age, and that a suitable husband has been found for her; that, having regard to the star under the influence of which she was born, if she is not married in the present Hindu month of *Jyeshta*, she cannot be married during the next two years, by reason of the absence of an auspicious day, that before that she may attain puberty; and that her not being married before that event will entail disgrace upon herself and her family. It is also said that her grandfather is old, and may not live until the girl attains her eleventh year, and that, in fact, having regard to the circumstances of the plaintiff, the difficulty of finding a husband in the Prabhu caste, and the chance of the girl's attaining puberty before her eleventh year, if Sonábái is not at once married, she may never be married at all. It is also said that, if I make the rule absolute, an appeal from it cannot be heard before the expiry of the present marriage season, which will end in the current month of *Jyeshta*. Were it not for these considerations put forward on the part of the defendants, I should at once, after having heard the arguments of counsel, having regard to the impossibility of the marriage tie, once made, being severed, have made the rule absolute. Feeling their weight I postponed my decision until I had given the matter the fullest consideration I could give to it at this stage of the case.

As one ground for forbidding altogether the marriage of Sonábái with Anandráv Dádáji to be solemnized, it is urged

(1) Bellasis' Rep., 1840—48, p. 43.

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by the plaintiff that they are first cousins, being respectively the daughter and son of two sisters, and that such a marriage is forbidden by the Shástrás, and is opposed to the usage of the Prabhu caste. Upon a point of this kind the custom of the caste is the rule by which I ought to be guided, (see the authorities quoted in Mandlik's Hindu Law, pages 409—435 and 440); and upon the affidavits I have come to the conclusion that, according to that custom, the proposed marriage is not illegal, though it is of an unusual character: so unusual that the defendants have only been able to specify one instance of its occurrence in their community. The fact of its being so very unusual should have weight given to it in considering the plaintiff's objection to the marriage; but I do not think that it alone is sufficient to justify me, under the circumstances I have referred to, in making the rule absolute.

Cause was shown against the rule in the following manner:— It was admitted by Mr. Macpherson, and indeed could not be denied, that by Hindu law the father is the proper person to give his daughter in marriage, and that under ordinary circumstances the conduct of the defendants in disposing of Sonábái in marriage without her father's consent would be indefensible; but it was said that the plaintiff was a convicted felon, and was in poor circumstances, and was unable to provide a proper house for his wife Ramábái and her daughter, and his means were not such as to enable him to get his daughter married It was difficult in all cases, it was said, to find suitable husbands for girls in the Prabhu community, owing to the scarcity of eligible boys; but it was impossible for the plaintiff to do so, owing to his antecedents and his inability to gloss them over by bestowing a sufficient dowry upon Sonábái. It was argued that the plaintiff had thus forfeited his right as a Hindu father, or, at any rate, that the Court should not assist him in asserting his right to the injury of Sonábái. "The Court should stay its hand." The work of Mr. Simpson on Infants (page 136 *et seq.*) was referred to, as showing that under special circumstances the Court of Chancery in England actually went so far as to restrain a father from exerting his parental right to the custody

and care of his children to the detriment of the latter, and the case of *Ex parte Warner* (1) was especially relied on. Mr. Macpherson contended that, if the plaintiff was not entitled to the custody and care of Sonábái, as these authorities showed that he was not, those who had her under their care, namely, her mother and maternal grandfather, had the right to dispose of her in marriage, and a marriage effected by them would be a valid marriage, citing for the latter proposition *Bái Rulyat* v. *Jeychund Kewul* (2).

If upon this rule I had to consider whether the father or the mother of Sonábái was the person entitled to her custody, I should have to look more closely into the authorities referred to by Mr. Simpson than I have been able to do since the argument of the rule. At present I incline to think that a single offence by the father, such as an offence of theft, unconnected with the domestic relations, would not justify the Court in assuming that his house was not the proper home for his children, even though that home should not be as spacious and well appointed as the house of the mother's father, in which the mother resides. But I do not think that question need now be decided; as it appears to me that it is not a necessary consequence, that because a father who has been once convicted of theft cannot offer to his wife and child a home in which the Court would compel them to reside, therefore the father is not to have a voice in the choice of a husband for his daughter, or is to be held to have lost his right to give his daughter in marriage to the husband of his choice. The one proposition does not seem to me to involve the other. I am supported in this view by a passage in the judgment of the Court in *Maháránee Rám Bunsee* v. *Maháránee Soobh Koonwaree* (3). "So far as the formal issues framed by the Court of first instance are concerned, the right of guardianship was deemed to be the main issue, the pleader of the parties apparently considering that whoever was legally entitled to the guardianship of the minor was also entitled to give her away in marriage. The Deputy Commissioner himself was, however, aware that

(1) 4 Bo. Ch. C., 101. (2) Bellasis' Rep., 1840—46, p. 43.
(3) 7 Calc. W. R. Civ. Rul., 321, at p. 323.

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the real issue was as to the right to give the girl in marriage; and we cannot admit that the person who has the right of guardianship of a female minor is necessarily the person who has the right of disposing of her in marriage. It appears to me rather that, while in certain cases the two rights will be found to go together, in other cases they will be found to be severed, and to vest in different persons. We are led to this conclusion by the fact that, whereas the mother is unquestionably entitled to be guardian failing the father, she does not stand next to the father as regards the right of giving her daughter in marriage; because it is laid down in the Mitákshara that, in the first instance, the father is to perform the initiatory ceremony such as the marriage of his daughter: in default of him the grandfather; on failure of the grandfather, the brother; the uncle and his son (next in order): and that on failure of all the persons above enumerated, the mother has the right of disposing of her in marriage."

The plaintiff has not deserted his wife or his daughter. He has offered them a house, and entreated them to join him in it. It is true that it is small and poor, and that the plaintiff only shares it jointly with his father and brother. I, by no means, blame the defendant Ramábái for refusing to share that house with the plaintiff. The conduct of the plaintiff has been such as to debar him of the right to blame her. I sympathise with the defendants in their desire to find a husband and a home for Sonábái; but, in the absence of authority, I am unable, on a rule of this kind, to hold that the plaintiff has forfeited his parental right to give his daughter in marriage, or that the defendants are justified in marrying her without her father's consent, and against his wish. That important question must be determined when the case comes to a hearing.

The next question which arises for consideration is, whether assuming that, as an abstract proposition, it is not shown that the plaintiff has forfeited his parental right, his conduct and delay are not such as to justify the Court in refusing to grant him a temporary injunction, under section 493 of the Code of Civil Procedure (Act XIV of 1882), and leaving him to assert his right

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at the hearing? Though I may entertain doubts as to whether the plaintiff in filing this suit is not influenced by a feeling other than a desire for what he considers to be for his daughter's welfare, I do not consider that it is proved that such is the case. His father Ganpatráv Pándurang has offered to provide a husband for Sonábai, and that father's right to give Sonábái in marriage is clearly superior to that of the defendants: see the case already referred to (*Maháránee Rám Bunsee* v. *Maháránee Soobh Kunwari*(1)). The marriage of Sonábái with her mother's sister's son is of such a character according to the Hindu Shástras, and is of so unusual a nature even in the Prabhu caste, as may well render it (though not unlawful) unpleasing to the plaintiff. The plaintiff may feel that the proposed marriage of Sonábái into the family of her maternal grandfather may, in effect, sever the bonds of connection between him and his daughter by reason of the animosity which exists between the plaintiff and the father of Ramábái. To forego such feelings in consideration of his daughter's welfare is a course to which I might advise, but cannot compel the plaintiff. I must disregard sympathy in deciding a case of this nature It is said I have a discretion in the matter. The plaintiff's delay has been urged upon me as a reason for its exercise. If it were established to my satisfaction that there had been delay on the part of the plaintiff, and that the defendants' or even Sonábái's interests had suffered therefrom, I should gladly exercise it, but I cannot say that there has been any undue delay. The defendants do not appear to have kept the plaintiff informed as to their negotiations for Sonábái's marriage, and it was apparently not until after his conversation with Bábáji Cáshináth that the plaintiff knew that the marriage between Sonábái and her cousin was about to take place. That was on the 11th May. Before that the plaintiff had not led the defendants to believe that he would consent to any marriage they might agree upon, nor do I think that the defendants could reasonably have drawn that conclusion from the plaintiff's not following up his letter of the 2nd December by active proceedings in Court. Lastly, it is not made out to

(1) 7 Calc. W. R. Civ. Rul., 321.

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my satisfaction that there is any well-grounded reason to fear that, if Sonábái be not married during the present marriage season, she may be condemned to a life of perpetual celibacy.

The affidavits of Anand Gangádhar Joshi, Pándurang Bhaskar Joshi, and Vishnu Mahádev Thosar on the subject are extremely guarded, and are sufficiently met by the affidavit of the plaintiff and of others not replied to. I make the rule absolute until the hearing. The costs will be costs in the cause.

Rule absolute.

Attorneys for the plaintiff:—Messrs. *Bálkrishna and Dikshit.*

Attorneys for the defendants:—Messrs. *Winter and Burder.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

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Hindu law—Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.

Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs There is no presumption of Hindu law as to its character.

Pándurang Mánkoji, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife Párvati and his three minor sons, Vithobá, Govind, and Ganpatráv, and directed as follows:—"In the event of my wife's demise previous to my sons attaining their full age of twenty one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property and divide the whole among such sons, or the survivors of them." Subsequently to the testator's death, his widow Párvati managed his estate, and probate of his will was granted to her alone in January, 1832. In 1836 she bought the V. property for Rs. 2,801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "Párvati, widow and administratrix of the late Pándurang Mánkoji, her heirs, executors, administrators, and assigns." In 1845 the eldest son Vithobá separated from the family, and gave a release to his mother Párvati. In 1854 she purchased the P. property for Rs. 8,452, the conveyance being to

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"Párvati, her heirs, executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of Pándurang Mánkoji, deceased." In the same year, *viz.*, 1854, the second son Govind separated, and gave Párvati a release. The third son Ganpatráv, (the third defendant), continued to live with his mother Párvati until 1871, in which year she died intestate. Ganpatráv then entered into possession of all the property which she had or managed in her lifetime, including the V. and P. properties. In 1879 he mortgaged these properties to the first two defendants for Rs. 12,500. His sons, (the plaintiffs), now alleged those properties to be ancestral, and complained that he and the mortgagees were acting in collusion; that he had charged the properties unnecessarily; and that he and the mortgagees were about to sell them at an undervalue for the purpose of defeating their (the plaintiffs') rights. They, therefore, filed this suit, and prayed *(inter alia)* that the claims of the mortgagees, after being ascertained, might be paid off The defendants denied that the properties in question were ancestral property in the hands of Ganpatráv, (the third defendant), or that the plaintiffs, as his sons, had any interest therein.

Held, that the interest which the third defendant Ganpatráv derived from his mother Párvati in the mortgaged premises was ancestral property in respect of which the plaintiffs had no present right of interference.

The Court ordered that on payment of the mortgage-debt the properties should be reconveyed to the third defendant, and, in the event of their being sold, that the whole of the surplus proceeds should be paid to him.

The original property was to be regarded, as in 1831, the self-acquired property of Pándurang Mánkoji, and as having passed under his will. In the absence of any evidence with regard to it, there was no presumption as to its character; and the plaintiffs, who alleged it to be ancestral, were bound to prove that fact.

On Pándurang Mánkoji's death, his sons, Vithobá, Govind, and Ganpat, (third defendant), took whatever they became entitled to, under their father's will, as their self-acquired property, but in co-parcenery according to Hindu law, and not as joint tenants according to English law. As to Párvati, she took, under the will, an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they might claim their shares. On the sons claiming their shares, one share would be left with Párvati, and that share, subject to her incapacity as a Hindu widow to deal with immoveable property given her by her husband, would then become hers absolutely.

Vithobá and Govind having separated, Párvati and Ganpatráv, (third defendant), continued to treat themselves as a joint family, and when Párvati died in 1871, her share in the joint property lapsed for the benefit of Ganpatráv. That share, whether he took it by inheritance or by survivorship, having originally formed part of his father's estate, became ancestral in his hands.

THE plaintiffs were the sons of the third defendant, Ganpatráv Pándurang, who had mortgaged certain properties to the first and second defendants. The plaintiffs in this suit sought to restrain

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the first and second defendants, (the mortgagees), from selling or completing the sale of these properties; and prayed that the said defendants might be ordered to render a true account of the mortgage executed to them by the third defendant.

The two properties in question were situated, the one at Vithalvádi and the other at Parel, in Bombay, and they were mortgaged by the third defendant to the first and second defendants on the 2nd June, 1879, for the sum of Rs. 12,500, with interest thereon at the rate of 12 *per cent. per annum*. The plaintiffs alleged that the two properties were ancestral, and were worth Rs. 45,000; and that their father Ganpatráv, (the third defendant), was, at the time of the mortgage, in need only of a sum of about Rs. 6,000, in order to satisfy a decree which had been passed against him; and they submitted that their father had no right, under the Hindu law, to charge the properties with a larger sum than was necessary. They further complained that since the date of the said mortgage their father, (the third defendant), had improperly and unnecessarily obtained further loans from the first two defendants, with whom he was acting in collusion, and had charged these further loans on the said two properties, so that the amount now due to the first two defendants amounted nearly to Rs. 22,000; and that this was done for the purpose of defeating the plaintiffs' future rights in their ancestral property.

The plaintiffs further alleged that the first two defendants had been advertising the sale of the two properties, and, in collusion with the third defendant, had attempted to effect a collusive sale at an undervalue; that the Vithalvádi property, which was worth Rs. 30,000, had actually been sold for Rs. 17,500, and had been bought in by the first and second defendants in the name of another person.

The plaintiffs, therefore, prayed that the defendants might be restrained from selling or completing the sale of either property until the hearing of this suit; that the sale of the Vithalvádi property might be declared null and void, and that the said property might be sold by the Court, and the claim of the first and second defendants, after being ascertained, might be paid off,

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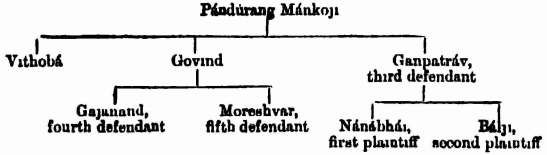
The fourth and fifth defendants were first cousins of the plaintiffs being sons of Govind Pándurang, a deceased brother of Ganpatrav Pándurang, the third defendant Govind had in his lifetime claimed to be interested in the mortgaged properties and the plaintiffs therefore made his sons parties to this suit, and as against them prayed for a declaration that they had no interest in the properties in question

As above stated, the plaintiffs alleged that the mortgaged properties were ancestral properties The following is a genealogical table of the plaintiffs' family —



Pándurang Mánkoji, the grandfather of the plaintiffs and the father of the third defendant, died in 1831, possessed of considerable moveable and immoveable property, but whether this property was ancestral or self-acquired in his hands, there was no evidence to show He was divided from his brothers, of whom he had three At his death he left three sons, *viz*, Vithobá Govind, and the third defendant Ganpatráv, and by his will dated the 18th August, 1831, he appointed two of his brothers and his wife Parvati his executors and bequeathed his property as follows —

'I give and bequeath unto my beloved wife and three minor sons, Vithobá, Govind, and Ganpatráv, all my estate and property whatever, besides the pension which might be allowed them from Warden's Official Fund, to which I have been a subscriber for twenty-eight years In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c then I direct my surviving executors will secure my property, and divide the whole among such sons or the survivors of them"

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Subsequently to her husband's death, Párvati managed the estate. Probate of his will was granted to her alone on the 4th June, 1832. On the 9th January, 1836, she bought the Vithalvádi property for Rs. 2,801. The deed of sale stated that this property was conveyed to "Párvati, widow and administratrix of the late Pándurang Mánkoji, her heirs, executors, administrators, and assigns;" but there was no evidence to show out of what funds this property was bought.

In 1845 the eldest son Vithobá separated from the family, and gave a release to Párvati, his mother.

In 1854 Párvati purchased the Parel property for Rs. 8,432, the conveyance being to "Párvati, her heirs, executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of Pándurang Mánkoji, deceased."

In the same year, 1854, the second son Govind separated and gave Párvati a release. In 1871 Párvati died intestate; and Ganpatráv, (the third defendant), who had until then continued to reside with her, entered into possession of all the property which she had or managed in her lifetime, including the two properties in question in this suit.

Prior to her death, *viz.*, in 1862, Párvati had mortgaged, by way of equitable mortgage, both these properties to one Pestonji Dinshá, whose assignee, Adarji Dádábhái, brought a suit upon the mortgage, and in August, 1877, obtained a decree[1]. In order to pay off this decree, Ganpatráv mortgaged the two properties in question to the first two defendants for Rs. 12,500 on the 2nd June, 1879, as stated in the plaint.

Macpherson and *B. Tyabji* for the plaintiffs.

Starling and *Telang* for defendants Nos. 1 and 2.

Lang and *Vicáji* for defendant No. 3.

Defendants Nos. 4 and 5 appeared in person.

For the plaintiffs it was contended that the mortgaged property was ancestral—Mayne on Hindu Law, p. 248, 249; *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*[2]; *Nund Coomar Lall* v. *Razeeoodeen*[3]; West and Bühler, p. 714.

(1) See I. L. R., 3 Bom., p. 312. (2) L. R., 9 Ind. App., 128, at pp. 142-143.
(3) 10 Beng. L. R., 183, at p. 192.

For the defendants it was contended that Pándurang Mánkoji having made a will, the presumption was that his property was self-acquired; and that, after his death, Párvati and Ganpatráv held it jointly. Counsel referred to Mayne's Hindu Law, sec. 250; West and Bühler, p. 331, note (E).

5th August, 1886. FARRAN, J.:—By an indenture of mortgage bearing date the 2nd June, 1879, the third defendant Ganpatráv Pándurang mortgaged two properties—one at Vithalvádi and the other at Parel—to the first and second defendants, to secure repayment of the sum of Rs. 12,500, with interest thereon at the rate of 12 *per cent. per annum*. The first and second defendants, Achratbái and Nárrandás Nathubhái, made some abortive attempt to sell the mortgaged properties, and ultimately bought them in the name of Purshotam Narottam, the sixth defendant.

The plaintiffs, Nánábhái Ganpatráv and Bálji Ganpatráv, the sons of the third defendant Ganpatráv Pándurang, have filed the present suit, praying, in effect, that it may be declared that the mortgaged premises are ancestral in the hands of their father Ganpatráv Pándurang, and that the plaintiffs are equally interested with him therein; and further, (alleging that Ganpatráv Pándurang is colluding with the mortgagees, and that the properties are in danger of being sold at an undervalue), that the mortgaged premises may be sold under the direction of the Court, and that the first and second defendants, the mortgagees, may be paid what is justly due to them, and that the balance may be dealt with, having regard to the rights of the plaintiffs and of the third defendant *inter se*.

The defendants Nos. 4 and 5, Gajánand Govind and Moreshvar Govind, are minors. They are added as defendants to the suit, because their father Govind Pándurang in his lifetime claimed to be interested in the mortgaged premises; and the plaintiffs seek a declaration that his minor sons are not interested therein. As to the latter portion of the relief sought by the plaint, I consider that it cannot be given in this suit, and the defendants Gajánand and Moreshvar will be dismissed therefrom without prejudice to their rights (if any) against the property in the possession of the third defendant and of the plaintiffs.

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Save as to the misjoinder of the minor defendants, no objection is taken to the frame of the suit; and it has been agreed between the parties that, whatever may be the rights of the plaintiffs and of the third defendant *inter se*, the mortgaged properties, in the event of their not being redeemed, shall be sold by the Court, and the amount justly due to the mortgagees paid thereout; the balance being dealt with according to the rights of the plaintiffs and of the third defendant respectively therein.

The only issues, accordingly, which need be dealt with in the suit are the second, fourth, and fifth, which are—

(2) Whether the property comprised in the said mortgage is or was ancestral property in the hands of the third defendant.

(4) What sum is due at foot of the said mortgage.

(5) Whether the plaintiffs are entitled to any and what relief in this suit. No evidence has as yet been given on the fourth issue. It has been reserved until after the decision on the second.

The only facts proved relating to the second issue are these. Pándurang Mánkoji, the father of the defendant Ganpatráv, was divided from his brothers, Cambá, Venkobá, and Bháskar Mánkoji. Of these, Bháskar when he died left no property. Cambá, who was an orderly in the Chief Engineer's office on pay of Rs. 20 or Rs 25 *per* month, left one small house. Venkobá died possessed of property of some value.

Pándurang Mánkoji died in or about the Christian year 1831, possessed of two carts and a piece of vacant land in Bombay, besides moveable property of considerable value. He left a will, bearing date the 18th of August, 1831, whereby he appointed his brothers Venkobá and Cámbá and his wife Párvati his executors and executrix respectively; and devised and bequeathed his property in the following words:—

"I give and bequeath unto my beloved wife and three minor sons, Vithobá, Govind, and Ganpatráv, all my estate and property whatever, besides the pension, which might be allowed them from Warden's Official Fund, to which I have been a subscriber for twenty-eight years. In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to

entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property, and divide the whole among such sons or the survivors of them." He also made provision for his daughters. Párvati and her three sons survived the testator, and probate of his will was granted to Párvati alone on the 4th June 1832 (exhibit A).

Beyond what may be inferred from the above statement of facts, there is nothing to show whether the property, of which Pándurang Mánkoji died possessed, was ancestral or self-acquired in his hands Párvati and her sons for some years lived together as members of a joint Hindu family. On the 9th of January, 1836, in consideration of the sum of Rs. 2,801, one Ananta Raghobá conveyed, by deed of that date, the Vithalvádi property to Párvati, "widow and administratrix of the late Pándurang Mánkoji, her heirs, executors, administrators, and assigns." There is no evidence to show from what source the consideration money for that property was paid (exhibit No. 1).

In 1845 Vithobá Pándurang, having at that time received his share of his father's estate in cash or moveable property, separated from his mother and brothers, and executed a release The fact of such separation is proved by the proceedings and decree in Suit No. 9 of 1874, in which Vithobá Pándurang was the plaintiff and Govind and Ganpatráv Pándurang were the defendants (exhibits B, C, D, and E). The release was not produced in that suit, and is not now forthcoming. It was in favour of Párvati (see exhibit G).

On the 24th of August, 1854, Rámchandra and Lakshman Dájibá bargained and sold to Párvati, "her heirs, executors, administrators and assigns," the Parel property above referred to, and certain other properties with which this suit is not concerned (exhibit No. 2). The consideration for the purchase was the sum of Rs. 8,452 paid in different sums by Párvati to her vendors. Párvati, in the portion of the deed in which the parties to it are described, is mentioned as being "the widow and administratrix of Pándurang Mánkoji, deceased."

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In 1854—the exact date is not in evidence—Govind Pándurang received his share in his father's estate, and separated from his mother and brother Ganpatráv, and passed a release to Párvati. This appears from an affidavit made by him in the Suit No. 9 of 1874, put in as exhibit C, and his written statement in Suit No. 392 of 1874 (exhibit G). Down to the date of his separation, Govind and his mother and brother Ganpatráv had lived together as members of a joint Hindu family, and when he separated, Ganpatráv and his mother continued to do so. The release which Govind executed is not in evidence.

In 1862, Párvati gave an equitable mortgage over the Vithalvádi and Parel properties to one Pestonji Dinshá. She died in 1871, intestate. Down to the time of her death she seems to have managed the joint property, or at least it was managed in her name. The defendant Ganpatráv says that after he began to earn his livelihood as a clerk in the Telegraph Department he paid his earnings, Rs. 100 *per mensem*, to Párvati. When she died, Ganpatráv continued in possession of all the property she had possessed or managed in her lifetime.

On the 15th August, 1874, Adarji Dádábhái, as assignee of the equitable mortgage created by Párvati in 1862, filed a suit, (No. 392 of 1874), against Vithobá, Govind, and Ganpatráv Pándurang for the purpose of establishing the mortgage, and praying for a sale of the property. He succeeded in establishing his claim to the extent of Rs. 6,000 for principal and interest[1]. Costs of suit were also awarded to him (exhibits H and I). It was for the purpose of satisfying the decree of the Appellate Court in Suit No. 392 of 1874 *(inter alia)* that the defendant Ganpatráv Pándurang executed the mortgage of the 2nd June, 1879, (exhibit J), in favour of the first and second defendants which I have mentioned.

As the mortgaged premises were purchased by Párvati as executrix of Pándurang's estate and during her management of it, they must, in accordance with the ordinary presumption, be treated as forming a portion of that estate, and treated as if they had been purchased by Pándurang himself, notwithstanding the

[1] See I. L. R., 3 Bom., 312.

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limitation to the heirs, executors, administrators, and assigns of Párvatibái.

The first question which arises is, whether the property, which came into the possession of Párvati upon the death of Pándurang Mánkoji, is to be treated, for the purpose of this suit, as having been the ancestral, or the self-acquired property of the latter. Actual proof upon this point there is none. If, in order that the plaintiffs should succeed in their suit it be necessary that the property left by Pándurang Mánkoji should be held to have been his ancestral property, it lies upon the plaintiffs to prove, in some way or other, that it was ancestral in his hands. There is no presumption in Hindu law upon the point which they can invoke in their favour. There is no presumption one way or the other. It is just as likely that Pándurang Mánkoji acquired the property which he died possessed of, as that Mánkoji or Mánkoji's father acquired it. There are faint indications, on the other hand, that the property was self-acquired by Pándurang, arising from the facts, that one of his brothers, Bhásker, left no property at all, and that Pándurang made a will of his property, which was recognized as a valid will, and acted upon as such by all his sons, which he could not have done effectually had his property not been self-acquired. These indications have, however, little, if any, probative force. The plaintiffs none the less have to make out their case upon this, as upon every other point; and, if they fail to do so, and this point is essential to their success, their suit must fail. I adopt to a considerable extent the views expressed in Mayne's Hindu Law, sec. 263. The mortgaged property must therefore, be treated in this suit as the self-acquired property of Pándurang Mánkoji, and as having passed under his will, since the plaintiffs have failed to prove the contrary.

The above proposition being established, it was not contended, by counsel for the plaintiffs, that the decision of the Appellate Court lately given in the case of *Jugmohandás Mangaldás* v. *Sir Mangaldás Nathubhái*[1] would not be applicable to the present case. From that decision it follows, I think necessarily, that Vithobá, Govind, and Ganpatráv Pándurang took whatever they

(1) I. L. R., 10 Bom., 528.

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became entitled to under their father's will, as their self-acquired property, but in co-parcenery according to Hindu law, and not as joint tenants according to English law. It is more difficult to determine what interest Párvati took in the property It is open to argument, upon the authorities, that she took not more than an interest to endure during her life—*Mahomed Shumsool* v. *Shewukrám*(1).

The more correct construction, however, I hold to be that the will gave Párvati an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they were to be entitled to claim their shares. On the sons claiming their shares, one share would be left with Párvati, and that share, subject to her incapacity, as a Hindu widow, to deal with immoveable property given her by her husband, would then become hers absolutely.

She did not, however, at that period remove her share from the common stock, nor did she ever attempt to separate her interest in the property from that of her sons. She managed for them, and was treated as the head of the family. It would perhaps be incorrect to speak of her as co-parcener with her sons, as their father would have been had he lived; but yet the family after his death acted exactly as if Pándurang had survived in Párvati. If Párvati had died before the separation of Vithobá, I cannot but think that her interest would have been treated as having lapsed for the benefit of the co-parceners, just in the same way as if one of the brothers had died childless. Vithobá took his share, and separated. The joint family continued upon the same basis. So, too, when Govind divided, Párvati and Ganpatráv continued to treat themselves as constituting a joint family. When Párvati died in 1871, her share in the joint property lapsed, I think, for the benefit of Ganpatráv It does not seem, however, material to determine whether Ganpatráv took Párvati's share by survivorship or inheritance, as, if that share is ancestral in his hands in the event of his taking it by inheritance, it seems to me that it must be equally so in the event of his

(1) L. R., 2 Ind. App., 7

taking it by survivorship. In the case of the father this is clearly so. A father and son possessed of no ancestral estate by their joint exertions acquire some property. The son's share in that property is self-acquired in his hands—*Chaturbhooj* v. *Dharamsi*[1]. The father dies, and his self-acquired share devolves on his son by survivorship. It cannot be but that the son takes that accretion to his share as ancestral. If just before his death the father had separated, and the son upon the father's death had taken his share, such share would be ancestral in the hands of the son *A fortiori* must it be ancestral if the father dies joint with his son. Mr. Mayne discusses this question as between brothers at section 250 of his work practically the converse of this case.

The question, therefore, must be considered whether property which a son derives from his mother is ancestral in his hands when such property originally formed part of the father's estate. In the case of *Nund Coomár Lál* v. *Razeeooddeen*[2] the Court adopted the following passage in West and Buhler, p 323 (2nd ed.), as correctly expressing the law as to ancestral property:— "On the other hand, property inherited by a father from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the *apratibandhadáya*, or 'unobstructed inheritance'". The case before the Court related to property inherited, not from a mother, but from a collateral relation. In *Muttayan Chetti* v. *Sangili Vira*[3] the question arose as to the nature of a father's interest in a *zamindári* which, having been inherited by his mother from her father, devolved upon her death upon him. The Court came to the conclusion that property inherited through the mother is ancestral, and not self-acquired. In the beginning of the judgment they say (at p. 375): "It" (such property) "may not be ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to partition under the Mitákshara Law at the instance of the son, but it is not self-acquired property, on that ground, for purposes other than

(1) I. L. R., 9 Bom., at pp. 445, 446 (2) 10 Beng. L. R., 183.
(3) I. L. R., 3 Mad, 371.

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those of partition." In that case it was sought after the death of the *zamindár* to establish a charge given by him over the *zamindári* as against the defendant, his son, and the right of the *zamindár* to alien the *zamindári* beyond his own lifetime was the point which the Court had to decide. The Court decided against the right. The case went on appeal to the Privy Council, and was reversed, on the ground that the debt, to secure which the charge was created, was not illegal or immoral, and that the decision in *Girdhúree Lall's Case*[1] applied to it. As to the nature of the property, their Lordships said: "It was contended, on behalf of the plaintiff, first, that the *zamindári*, having descended to the defendant's father from his maternal grandfather, was his self-acquired property, or, at any rate, that he was not, as regards his son, under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly, that the whole *zamindári*, or at least the interest which the defendant took therein by heritage, was liable as assets by descent in the hands of the defendant, as the heir of his father, for the payment of his father's debts. Their Lordships are of opinion that the appellant is entitled to succeed upon the second ground, and they, therefore, think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the defendant's father—*Muttayan Chettiar* v. *Sangili Vira Pándia Chinnatambiar*[2]."

Observing upon that case Mr Mayne, after citing 3 Dig., 61, West and Buhler, p. 323, approved in *Nund Coomár Láll* v. *Razeeoodeen*[3], says (see Mayne's Hindu Law, (3rd ed.), page 240, *note*). "The High Court of Madras has held that property which descended to a man from his maternal grandfather was ancestral property, which he could not alienate to the detriment

(1) L. R., 1 Ind. App., 321. (2) L. R., 9 Ind. App., 128, at p. 143.
(3) 10 Beng. L. R., 183, at p. 192.

of his son. None of the above authorities were referred to; the decision was reversed by the Privy Council on another point. When the case arises again, it will be material to remember that property only becomes joint property by reason of being ancestral property when the ancestor, from whom it was derived, was a paternal ancestor. See Mit. i. I, secs. 3, 5, 21, 24, 27, 33; *i.* 5, secs. 2, 3, 5, 9—11." Messrs. West and Buhler's comment on the case is as follows:—"In a recent case the Privy Council have said that a *zamindári* inherited through a mother was not self-acquired property, but they expressed no opinion whether it was subject to the same restrictions on alienation or hypothecation as if it had descended to the *zamindár* from his father or grandfather. It may be concluded, therefore, that the more extensive construction of '*pitrarjit*' or 'ancestra will prevail, though probably without the consequence of giving to the son equal power with the father over such ancestral property, which is not in the stricter sense 'patrimonial' by "agnatic descent'"—West and Bühler's Hindu Law, pp. 714 and 715 (3rd ed). The learned authors of the work do not, however, adopt the distinction of the Madras Court as set out in the passage I have last cited from their judgment, which they regard as fanciful, and conclude their comment thus: 'The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired, or according to the special rules applicable on account of the character of the property as sacred or secular, or as affected or not with the support of public duties,'" p. 715.

I think I shall be acting most in accordance with the principles of Hindu law and with the weight of authority in holding that, in the present case, the interest which the defendant Ganpatráv Pándurang derived from his mother Párvati in the properties in question is ancestral property in respect of which the plaintiffs have no present right of interference; and I shall, therefore, decree that the whole of the surplus proceeds of the mortgaged premises (if any), in the event of their being sold, be paid to the defendant Ganpatráv Pándurang. In his hands they will remain of the same character as were the mortgaged premises them-

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selves. The agreement between the parties relieves me from the necessity of determining whether the plaintiffs have such an interest in the property as would technically have entitled them to maintain a properly constituted suit for their redemption.

The minutes of the decree will be as follows :—

Dismiss the suit as against the defendants Ganpatráv Govind and Moreshvar Govind, without costs. Order that, upon payment by the defendant Ganpatráv Pándurang or the plaintiffs of the amount of the moneys which shall be found to be due to the first and second defendants at foot of their mortgage of the 2nd of June, 1879, with interest as therein provided, and their taxed costs of this suit within six months from the time when such amount shall be ascertained, the first and second defendants do reconvey the mortgaged premises to the defendant Ganpatráv Pándurang, but, in the event of such payment being made in whole or in part by the plaintiffs, subject to a charge in their favour for the amount which they shall so have paid.

In default of such payment within the time given, let the mortgaged premises be sold. And out of the net proceeds of such sale let the first and second defendants be paid the aforesaid amount with interest and costs, and let the balance (if any), after paying thereout, firstly, the taxed costs of the defendant Ganpatráv Pándurang and, secondly, of the plaintiffs, be paid to the defendant Ganpatráv Pandurang. No other order as to costs.

Attorneys for the plaintiffs :—Messrs. *Bálkrishna and Dikshit.*

Attorneys for the defendants :—Mr. *Mansukhlál M. Munshi*; Messrs. *Tyabji and Dáyábhái*, and Messrs. *Nánu and Hormasji.*

ORIGINAL CIVIL.

Before Mr Justice Farran

DE SOUZA AND ANOTHER, (PLAINTIFFS), v. VAZ AND ANOTHER, (DEFENDANTS) *

1887. *July* 21.

Will—Construction—Vesting—Period of distribution—Gift of dividends

S, a Portuguese inhabitant of Bombay, by his will dated 19th March, 1866, devised all his estate, real and personal, to his executors in trust, to realize the same, and invest the proceeds thereof in the public funds, and directed as follows —

"(1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attain the age of twenty-one years, when his or their share shall be paid unto him or them

"(2) I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have attained the age of twenty one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time."

"(5) In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them"

Held, that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by such gift his share of the *corpus* became vested in each son when he attained that age

Held, further, that the provisions of the third clause, which related to the distribution, did not divest the shares so vested Clear words must be used to divest an estate once vested.

Held, also, that only such of the daughters as were surviving at the period of distribution, specified in the second clause of the will, were entitled to a share in the estate.

THIS suit was filed in March, 1886, by the two surviving sons of one Louis Maria de Souza, a Portuguese inhabitant of Bombay, who died in 1865. The plaintiffs prayed to have their father's will construed by the Court, and that the shares and interests of the parties entitled under the said will might be ascertained and declared, &c., &c.

The plaint set forth the following facts:—The said Louis Maria de Souza died in 1865, leaving a will, dated 6th April, 1865,

* Suit No. 114 of 1887.

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of which the defendant João Feleciano Vaz and one Dr. Mathias Antonio Misquita were appointed executors. Probate of the will was granted on the 19th March, 1866. One of the said executors, *viz.*, Dr. Misquita, died on the 25th September, 1875. He also left a will, dated the 24th September, 1875, of which the said João Feleciano Vaz and one Jeronimo Misquita (since deceased) were the executors. This will was duly proved on the 13th March, 1876. At the time of this suit the defendant João Feleciano Vaz was the sole surviving executor of both the said wills.

The first-mentioned testator, Louis Maria de Souza, left him surviving three sons, *viz.*, Louis Gabriel, who died on the 27th June, 1876, and the two plaintiffs, *viz.*, Peter Francis de Souza and Pascoal Philip de Souza, and two daughters, *viz.*, the defendant Rosa, wife of the defendant Louis A. Miranda, and Joana, who died on the 6th November 1877, the wife of Manuel F. Zuzuarte

The will of the testator was as follows:—

"I give, devise, and bequeath unto my executors, hereinafter named, all my estate and effects, real and personal, that I may die possessed of, or entitled to, in possession or expectancy, upon trust, to, as soon as conveniently can be, after my decease, collect, get in, and receive such parts thereof as shall consist of money or securities for money due on bonds, bills, notes, or other securities, and to invest the same in one or other of the public funds, and the dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children *until each of my sons attain the age of twenty-one years, when his or their share shall be paid unto him or them.* I desire that of the moneys belonging to me my executors shall give away to my daughters each a sum of Rs. 1,000 as dowry on their being settled in marriage, and shall spend what may be necessary for wearing apparel and other expenses of marriage.

"2. I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have

attained the age of twenty-one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time.

"3. I give, devise, and bequeath my dwelling-house No. 25, all my household furniture, linen, wearing apparel, books, plate, chinaware, and whatever may be found therein at the time of my decease, unto my sons, to be shared by them in equal parts, on all my sons attaining the age of twenty-one years. In the meantime the said house, furniture, &c., shall be held in trust by my executors. My executors may, should they deem fit, rent, for the benefit of my children, a part of my house.

"4. I desire that my estate in the district of Kalyán, in Sálsette, enumerated in the schedule appended to this my will, should be sold by my executors and converted into money, which amount shall be added to the amount to be invested in public funds for the benefit of my sons and daughters as aforesaid. My daughters shall have no share in my dwelling-house or the furniture, &c., therein. I direct that all my just debts, funeral and testamentary expenses be duly paid and satisfied by my executors. And I do hereby nominate, constitute, and appoint Mr. J. F. Vaz and Dr. M. A. Misquita my executors of this my will. And I do hereby declare that my said executors and the survivor of them and the executors and administrators of such survivor shall and may at all times reimburse and indemnify themselves and himself respectively for all such costs, damages, charges, and expenses as they or either of them may be put to, or sustain in and about the execution of the trusts of this my will.

"5. In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them.

"6. And I hereby revoking all my former or other wills by me at any time made, I, the said Louis Maria de Souza, do this, which I declare to be my last will and testament. As witness my hand this 6th day of April, 1865."

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Pascoal Philip de Souza, (the second plaintiff), was the youngest son of the testator, and he attained the age of twenty-one in the month of August, 1883.

Both the executors of the testator's will after obtaining probate managed the estate down to the year 1875, when one of them, *viz.*, Dr. Misquita, died. Subsequently to that time the defendant Vaz remained in sole management of the estate.

The first plaintiff, (Peter Francis de Souza), became insolvent after this suit had been filed, and his estate vested in the Official Assignee, who was thereupon made a party defendant. At the date of the hearing, Pascoal Philip de Souza was the sole plaintiff on the record.

The following clauses of the plaint set forth the plaintiff's contention with regard to the construction of the will :—

"The plaintiff submits that, according to the true construction of the first and second clauses of the will of the said Louis Maria de Souza, the income only and not the *corpus* of the funds and investments mentioned in the first clause is thereby dealt with, and the *corpus* of such funds and investments, after deduction thereout of the dowries of the daughters of the testator, is dealt with by the second clause, so that, in the events which have happened, the *corpus* of the said funds and investments is now divisible between the plaintiff and Peter Francis de Souza, the insolvent, and their sister, the defendant Rosa Miranda, in equal shares.

"7. The plaintiff submits that, according to the true construction of the third clause of the said will of the said Louis Maria de Souza, the plaintiff and Peter Francis de Souza, the insolvent, are, in the events which have happened, entitled, in equal shares, to the house therein mentioned and all that it contained at the time of the said testator's decease, which included not only furniture, but a considerable quantity of valuable jewellery.

"8. The plaintiff submits that, according to the true construction of the said will of the said Louis Maria de Souza, no share in the *corpus* of the funds and investments, mentioned in the first

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and second clauses of the said will, and no share of the house and contents thereof, mentioned in the third clause of the said will, ever vested in the said testator's eldest son, the said Louis Gabriel de Souza, deceased, and the said testator's daughter, Joana Zuzuarte, deceased, or either of them, inasmuch as they both died before the said testator's youngest son the plaintiff Pascoal Philip de Souza attained the age of twenty-one years."

The plaintiffs also complained that the executors had mismanaged the estate. In particular they charged that in the year 1866 they paid to the testator's eldest son, Louis Gabriel (since deceased), a sum of Rs. 2,486-3 out of the estate on account of and in anticipation of his then contingent share. The plaintiffs contended that the defendant Vaz and the estate of the deceased executor Misquita should be held liable to make good this sum and all sums improperly paid out of the estate. The plaint prayed that the will might be construed, and for accounts, &c.

The defendant Vaz filed a written statement, in which as to the construction of the will he submitted to the judgment of the Court. He denied all mismanagement of the estate; and as to the payment of Rs. 2,486-3 to Louis Gabriel de Souza, he submitted that the payment was a proper one; that it was made by the executors *bonâ fide*, and in the belief that the said Louis was entitled to it.

Macpherson, (Acting Advocate General), and *Robertson* appeared for the plaintiffs.

Lang and *Russell* for the first defendant.

Jardine and *Chitty* for the fifth defendant.

The following authorities were cited:—*In re Hunter's Trusts*(1); Williams on Executors (8th ed.), p. 1230; *In re Duke; Hannah* v. *Duke*(2); *In re Bunn; Isaacson* v. *Webster*(3); *Scotney* v. *Lomer*(4); Theobald on Wills (3rd ed.), p. 390; *Ford* v. *Rawlins*(5); *Sansbury* v. *Read*(6); *Vorley* v. *Richardson*(7).

(1) L. R., 1 Eq., p. 295.
(2) L. R., 16 Ch. Div., 112.
(3) L. R., 16 Ch. Div., 47.
(4) L. R., 29 Ch. Div., 535.
(5) 1 Sim. & S., 329.
(6) 12 Ves., 75.
(7) 8 De G. M. & G., 126.

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28th July, 1887. FARRAN, J.:—This was a suit filed for the purpose of having certain clauses in the will of Louis Maria De Souza construed, and the shares of the beneficiaries under the will paid to them. The plaint also sought to have the accounts of the executors under the will taken. The plaintiff now on the record, in view of saving expense, does not any longer desire the taking of the accounts; and, with one exception, has abandoned his objection to the items in those accounts of which he complained. The only matters I have, therefore, to deal with, are the construction of the will, and the ascertainment whether a payment of Rs. 2,486-3 to Louis Gabriel, a son of the testator, ought to be made good to the estate by the surviving executor J. F. Vaz in his own person and as the surviving executor of his deceased co-executor M. A. Misquita.

The will to be construed is as follows:—(His Lordship read the will as above set forth.)

The testator died in 1865, leaving him surviving three sons, Louis Gabriel, Peter Francis, and Pascoal, and two daughters, Rosa Miranda and Joana.

The defendant, João Feleciano Vaz, and Mathias Antonio Misquita (now dead) proved the will on the 19th March, 1866.

The executors about this time made payments to Louis Gabriel out of the *corpus* of the funds in their hands, which aggregated the above mentioned sum of Rs. 2,486-3. Louis Gabriel died on the 27th June, 1876. The defendant Rosa Antonio de Souza is his executrix.

Joana married Manuel Francis Zuzuarte. She died about three years after her marriage in 1877 or 1879, leaving a daughter, who died in childhood, and her husband surviving her. The husband has been made a party defendant to the suit.

Rosa Miranda married Louis Antonio. She and her husband are alive, and are defendants in this suit.

Peter Francis, originally a plaintiff, has become insolvent, and the Official Assignee has been made a party defendant to represent his interest.

The plaintiff Pascoal, the youngest son, attained the age of twenty-one years on or about the 8th August 1883.

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I have first to determine what is the correct grammatical construction of the will, and then, having determined that, to ascertain what are the legal rights of the beneficiaries under it.

The will (1) directs the executors to collect the moneys of the testator, and to invest the moneys so collected in the funds. It then (2) provides for the maintenance of the testator's children out of the dividends upon the invested moneys, which are to be applied at the discretion of the executors towards the maintenance and education of the children until each son attains the age of twenty-one years, when his share *of the dividends* is to be paid to him. It then (3) provides for Rs. 1,000 being given as dowry out of the moneys of the testator to each of his daughters and for their marriage expenses being paid. These may be considered as provisions for intermediate expenditure out of the funds. Then (4) the second clause provides for the ultimate distribution of the residue, the bulk of the collected moneys, by directing that, after the testator's daughters shall be married and after all his sons shall have attained the age of twenty-one years, it shall be distributed between the sons and daughters of the testator that may be surviving at the time. This construction of the first and second clauses of the will, which is that for which counsel for the plaintiff contend, is a fair grammatical construction in which the several provisions as to the testator's moneys follow one another in just and logical order. The only objections to it are esoteric objections, based upon the probable intentions of the testator, which, resting, as they must do, upon speculation, are not a safe guide by which to interpret his language.

The alternative construction is to read the dependent sentence in the first clause "until each of my sons attain the age of twenty-one years, when his or their share shall be paid to him or them," which follows the provision for the maintenance and education of the children, as applying to the *corpus* of the fund, as though the words "of the funds" followed the word "share", and to construe the directions for distribution contained in the second clause as applicable only to the economies out of the dividends, or the accumulations of them, which the executors

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might be able to effect or make. This construction would exclude the daughters from all share in the bulk of the moneys, and give them a share only in the economies out of, or accumulations of, the dividends. It is not an ungrammatical, but it is a strained or forced construction, and is open to the following objections: —

(1) It places the direction for the ultimate disposition of the funds out of its proper place amongst the provisions for the intermediate charges upon it.

(2) It involves the testator's entertaining the idea that there would be economies out of, or accumulations of, the dividends, which he has not directed, and, judging from the words he has used, does not seem to have contemplated. His direction is that "the dividends" shall be applied in maintaining and educating the children at the discretion of the executors, and not such portion of the dividends as the executors shall think fit.

(3) It gives a different meaning to the words "moneys collected" in the second clause to that which they bear in the first clause. To these must be added the consideration that the testator in his will evidently contemplates that his daughters would be sharers in the collected moneys; for, when directing in the fourth clause the proceeds of his Kalyán estate to be added to such moneys for the benefit of his sons and daughters, he adds: "My daughters shall have no share in my dwelling-house, &c.," which forms the subject of a specific devise to the sons; and in the fifth clause he refers to a daughter's share going over to the survivors in case of her death under twenty-one. I accept, for these reasons, the plaintiff's reading of the first and second clauses of the will.

The question whether the son and daughter, who died before the period of distribution, having in their lifetime attained the age of twenty-one years are, through their representatives, entitled to share in the distribution; or, in other words, whether the sons and daughters on attaining twenty-one took a vested interest in their shares of the collected moneys, remains to be considered. The case of their having died under twenty-one is governed by the fifth clause, which makes provision for that

event. The answer to this question depends upon authority. As the will in question was made before the 1st January, 1866, the Succession Act does not apply to it.

Before referring to the authorities I remark that the fifth clause affords a key to the intention of the testator. It provides that, if a son or a daughter should die under the age of twenty-one years, his or her share,—*i.e.*, the share given to him or her by the will,—shall pass to the survivors; plainly thereby implying that such share is not to pass to the survivors if the son or daughter, to whom it is given, should die after attaining the age of twenty-one years. At the date of the will, twenty-one years was the age of majority for natives of the testator's class.

The rules of law deducible from the authorities, which have to be considered in connection with this will, appear to be these:—

"When there is a clear gift to an individual, an additional direction to pay when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in presenti, solvendum in futuro*"—Theobald on Wills, p. 384, (3rd ed.)

The same rule applies where there is gift to a class, and the distribution is postponed for the convenience of the estate or of division till all the members of the class attain a certain age, or till the youngest attains twenty-one—*Parker* v. *Sowerby*[1]; *Chiffers* v. *Abell*[2] cited in Jarman on Wills, Vol. II, p 837, (4th ed.); *Knox* v. *Wells*[3]. The rule is recognized in *Vorley* v. *Richardson*[4]; and see *Re Grove's Trusts*[5].

If the gift to the individual is, in terms, apparently made contingent upon his attaining majority, or a certain age, the giving of the interest upon the legacy to the legatee in the meantime will have the effect of vesting the gift, or rather of showing that it is the testator's intention that the gift shall vest—*Hanson* v. *Graham*[6]; *In re Hart's Trusts*[7]; *In re Bunn*[8]. The case of *Batsford* v. *Kebbell*[9] must either be considered as over-

(1) 1 Dr., p. 488.
(2) 3 Jur., p. 577.
(3) 2 H. & M., p 674
(4) 8 DeG. M. & G., p. 126.
(5) 3 Giff., p. 575.
(6) 6 Ves., p. 239.
(7) 3 DeG. & J., p. 195.
(8) R., 16 Ch. Div., 47.
(9) 3 Ves., 363.

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ruled, or as having been decided upon the peculiar terms of the particular will there construed—*In re Hart's Trusts*[1].

The same rule, however, does not apply where there is a gift of an entire fund payable to a class of persons equally upon their attaining a certain age. There a direction to apply the income of the whole fund, in the meantime, for their maintenance does not create a vested interest in a member of the class who does not attain that age—*In re Parker*[2]; *Leake* v. *Robinson*[3]; *In re Hunter's Trusts*[4]; *Lloyd* v. *Lloyd*[5].

Lastly, where the only gift to a class is contained in the direction to distribute, those alone, who answer to the description of the persons amongst whom the distribution is to be made at the time of distribution, are entitled to share—*Ford* v. *Rawlins*[6]; *Sansbury* v. *Read*[7].

These rules of construction must give way, of course, if the testator, by the words he has used, has excluded their application, as was clearly done in *In re Hunter's Trusts*[8] and as was held to have been done in *Vorley* v. *Richardson*[9] cited above.

I have reviewed the cases in this way, in order to place in their proper category those that have been cited to me. The general rules are clear enough. The difficulty is in deciding upon their application in particular instances.

In the present case there is no direct gift to the testator's children, as a class, contained in the first clause of the will; but there is a direction that the dividends arising from the invested funds shall be applied for their maintenance and education. Then in the second clause there is a direction that, after all the sons shall have attained twenty-one and after the daughters shall be married, the fund shall be distributed in equal parts between the sons and daughters. If the testator had paused there, the rule in *Parker* v. *Sowerby*[10] and that class of cases would probably have applied; but he adds the words "*that may be surviving*

(1) 3 DeG. & J., 195.
(2) L. R., 16 Ch. Div., 44.
(3) 2 Mer., 363.
(4) 1 Eq., 295.
(5) 3 K. & J., 20.
(6) 1 S. & St., p. 328.
(7) 12 Ves., p. 75.
(8) 1 Eq., p. 295.
(9) 8 DeG. M. & G., 126.
(10) 1 Dr., p. 485.

at the time"; thus, as in *In re Hunter's Trusts*(1) and in *Vorley v. Richardson*(2), excluding its operation.

The testator, however, in the first clause further directs that when each of his sons attains the age of twenty-one years his share shall be paid to him, thus withdrawing him from the general class, and allocating to him a particular interest in the fund. It is true that I have held that, grammatically, the share allocated to him is a share *of the dividends*, but the allocation or gift to a legatee of the dividends of a fund is a gift to him of the fund itself This has always been a rule of law. It was referred to by Sir William Grant in *Hanson* v. *Graham*(3) in 1801; it is recognized in the Indian Succession Act, sec. 159. The direction to the trustees to pay his share of the dividends to each son of the testator as he comes of age is a gift, and a vested gift, of such share to him. If *Batsford* v. *Kebbell*(4) is not overruled, and the particular expressions used in giving the interest are to be considered, the words here used are strong to show the testator's meaning. The testator directs his share of the dividends, not a share or a proportionate part, to be paid to Louis Gabriel when he reaches twenty-one years of age; and when you consider that direction in connection with clause 5, where it is directed that the share of a son shall pass to the other children if he should die under twenty-one, the intention of the testator is plain to vest each son's share in him when he attains the age of twenty-one. The words "to be paid" can indeed, if the context requires it, be read as referring to vesting, and not to payment—*Martineau* v. *Rogers*(5).

Is, then, the legacy vested in Louis Gabriel taken away by the second clause, which relates to the distribution? Down to that period he and his representatives are plainly entitled to the dividends on his share. No other disposition is made of them. I think the legacy is not so divested. It requires clear words to divest an estate once vested.

(1) 1 Ey., p. 295.
(2) 8 De G. M & G., p. 126
(3) 6 Ves., p. 239.
(4) 3 Ves., 363.
(5) 8 De G. M. & G., p 328.

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To prevent that result, the words sons and daughters *then surviving* might be read as referring to the *stirpes*, as was done in *Cooper* v. *Macdonald*[1], or rejected in so far they take away vested estates, as was done in *In re Duke*[2]; or, without doing violence to the context, might be confined to the daughters, and read as though the sentence ran "shall be distributed in equal parts between my sons and my then surviving daughters."

This construction makes the whole will harmonious. The first clause treats the daughters in the same way as it treats the minor sons, and does not give them a vested share in the dividend upon their attaining majority. They are similarly treated in the second clause if, when the period of distribution arrives, they shall not be then living. They in that case, like sons dying minors, take no share. This was the result which the parties interested in the estate agreed to in 1883. It is said that that agreement is void, as being without consideration; but it was clearly a family arrangement to prevent litigation. Rosa gave up her claim on Louis Gabriel's share, as the plaintiff gave up his. That is sufficient consideration to support the agreement. The plaintiff does not give evidence that he was *inops consilii* when he assented to it. He had attained his majority three years before the agreement was come to. If the construction of the will had been plain, the plaintiff's alleged abandonment of his legal rights against the executors of his father's estate might have been viewed with distrust; but, seeing that it was so doubtful that an extremely eminent barrister at different times gave diametrically opposite opinions as to its true construction, the plaintiff would seem to have been well advised to give up a doubtful right of little value, which could only be established by a suit at the expense of the estate.

The construction of the third clause of the will is free from doubt. It falls within the second rule above referred to. The opposite view was but faintly contended for by Mr. Robertson in his opening address. The Advocate General in his reply practically abandoned it.

(1) 16 Eq., 258. (2) L. R., 16 Ch. Div., 112.

I find on the issues (His Lordship stated the findings and continued)

Declare that, upon the true construction of the will of Louis Maria De Souza, the legal representative of Louis Gabriel De Souza was entitled to share in the distribution of the testator's moneys, directed in the second clause of his will, equally with the defendants Peter Francis and Rosa Miranda and the plaintiff Pascoal, and was also entitled to share equally with the defendants Peter Francis and the plaintiff Pascoal in the house and articles specifically devised by the third clause of the will, and direct that the defendant João Feleciano Vaz do now deal with the estate in accordance with such declaration Further directions reserved.

As to costs The executor Vaz will of course have his out of the estate taxed as between attorney and client As the plaintiff does not press the charges against the executor, it is to be regretted that he did not adopt the suggested course of stating a special case, as was done in *Vorley* v *Richardson*(1) It would be improper to give him his costs out of the estate relating to those charges which he has not established, but it does not seem to make much practical difference whether he is given his costs out of the estate, or whether he pays them out of his share in it. The same remark applies to the defendant Rosa Antonio The fairest way to the defendant Rosa Miranda, who has incurred no costs or very little, would be to leave all parties to bear their own out of their own shares, but as if the plaintiff had stated a special case I should have given him his costs out of the estate, I consider the proper order now to make is to give him the equivalent of such costs I shall direct that his costs, taxed as in a short cause, be paid to him out of the estate. All costs not provided for, will be paid by the parties respectively.

Attorneys for the plaintiffs —Messrs *Bicknell and Kángá.*

Attorneys for the defendants —Messrs *Tobin and Roughton;* and Messrs. *Hore, Conroy, and Brown*

(1) 8 DeG M & G, p 126.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *May 4.*

MIR IBRA'HIM ALIKHA'N AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* ZIA'ULNISSA LA'DLI BEGAM SA'HEB AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Certificate under Act XXVII of 1860—Regulation VIII of 1827, Sec. 9—Jurisdiction to grant certificate of administration—Foreigners residing abroad.

Under section 3 of Act XXVII of 1860 a certificate can be granted only for the estate of a British subject either resident within the district where the certificate is sought, or else having no fixed place of residence. The Act does not make provision for administration of the effects of a foreigner domiciled abroad.

While Act XXVII of 1860 has regard to the person, Regulation VIII of 1827, on the other hand, looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration. The intention of section 9 seems to be that when there are assets within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. The authority given under section 9 must be understood to be the same as under section 7.

B., a *sardár* of Baroda residing within the Gáikwár's territory, died there, leaving considerable property in the district of Surat. On his death, Mr. Lely, the Assistant Collector of Surat, was appointed administrator of B.'s estate under section 9 of Regulation VIII of 1827. Shortly after his appointment as administrator, Mr. Lely went to England on furlough. During his absence, the plaintiffs sued, as heirs of B., to recover the balance of principal and interest due on a bond executed by the defendants in favour of B.

Held, that the plaintiffs were incompetent to sue. Mr. Lely having been appointed administrator of B.'s estate, and never having been relieved of his office as administrator by the Court, as contemplated by section 9 of Regulation VIII of 1827, his *status* still subsisted, and while it subsisted, no one else could represent the estate. The appointment of an administrator excludes other representatives so long as it endures.

APPEAL from the decree of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 177 of 1881.

The facts of this case, so far as they are material for the purposes of this report, are as follows:—

The plaintiffs sued, as the heirs of Mir Bakar Ali, deceased, to recover the sum of Rs. 1,11,727-15-9, being the balance due on account of principal and interest on a bond executed by the defendants in favour of the deceased on the 9th May, 1871. The

* Appeal No. 68 of 1884.

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plaint stated that the cause of action had accrued on the 13th November, 1879, on which day it was alleged interest was last paid on account of the bond by the defendants. The suit was filed on the 4th October, 1881.

The deceased Mir Bakar Ali was a *sardár* residing at Baroda, outside British India. He died on the 11th August, 1880, leaving considerable property in the district of Surat.

On the 11th January, 1881, the District Judge of Surat appointed Mr. Lely, the Assistant Collector of Surat, to be administrator of the deceased's estate, under section 9 of Regulation VIII of 1827. On the 17th January, 1881, Mr. Lely gave notice to the defendants, requiring them to pay to him, as administrator, the balance due under the bond of 9th May, 1871. A few months afterwards Mr Lely went to England. In his absence the plaintiffs filed the present suit, as stated above, on the 4th October, 1881.

On the 16th June, 1882, an order was made by the District Court of Surat granting a certificate to plaintiffs Nos. 1, 2, and 3, under Act XXVII of 1860, but no certificate was taken out.

In their written statement the defendants replied *(inter alia)*, first, that the suit was barred by Act XVIII of 1848[1]; secondly, that the plaintiffs were not entitled to sue without producing a certificate of heirship or administration with reference to the estate of the deceased Mir Bakar Ali; and, thirdly, that the suit was barred by limitation.

The First Class Subordinate Judge held that the suit was not barred by Act XVIII of 1848, as the sanction required by the Act was produced during the course of the suit, and the defend ant Ziáulnissa Begam was not served with the summons till after it was filed. He was of opinion that, on the analogy of the decisions of the High Court allowing certificates of administration to be filed pending suit, this sanction was sufficient to

(1) Act XVIII of 1848 provides for the administration of the estate of the late Navab of Surat, and continues certain privileges to his family. Section 1 of the Act directs that no writ or process shall be sued forth or prosecuted against the person, goods, or property of certain members of the Navab's family, (among whom was Ziáulnissa Begam, one of the defendants to this suit), except with the consent of the Governor of Bombay in Council first obtained.

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give jurisdiction to the Court, although it had not been produced when the suit was instituted

The Subordinate Judge further held that no certificate was necessary under Act XXVII of 1860 as none but the plaintiffs were the heirs of the deceased, and, as such, entitled to recover the debt, and he was satisfied that the payment of the debt was withheld not from any reasonable doubt as to the party entitled but from vexatious and fraudulent motives

The suit was however, dismissed, on the ground of limitation—no payments on account of interest having been made within three years next before the institution of the suit

Against the decision the plaintiffs appealed to the High Court

Gokuldas Kahándas Parekh, for the appellants contended that payments on account of interest had been made by a duly authorized agent on behalf of the defendants up to 1879, so that the suit was not barred by limitation

Lang (with him *Shantarám Nárayán*) for respondent No 1 —The plaintiffs are not competent to sue for a debt due to the estate of the deceased Mir Bakar Ali The administration of that estate is vested in Mr Lely, who was appointed administrator under Regulation VIII of 1827 His appointment is still subsisting and so long as he continues to act as administrator he, and no body else, can sue in respect of the estate of the deceased Nor have the plaintiffs obtained a certificate under Act XXVII of 1860 The lower Court no doubt, says that the defendants are acting from vexatious motives, but it is impossible to say, in a Mahomedan family, that other claimants may not turn up, and subject the defendant to further litigation. Refers to *Muttammal* v *The Bank of Madras*[1], *Chunder Coomar Roy* v *Gocool Chunder Bhuttacharjee*[2], *Janaki Ballav Sen* v *Hafiz Mahomed Ali Khan*[3] The suit is also barred under section 1 of Act XVIII of 1848

Gokuldas Kahandas Parekh —Mr Lely was no doubt appointed administrator under Regulation VIII of 1827 But he went to

(1) I L. R., 7 Mad., 115 (2) I L. R., 6 Calc., 370

(3) I L. R., 13 Calc., 47

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England shortly after his appointment. He does not continue to act as administrator. The estate is no longer represented by him. In the absence of any administrator, the plaintiffs are entitled, as heirs of the deceased, to recover the debt. But for this suit the debt would become time-barred, and the estate would suffer a heavy loss. Act XXVII of 1860 does not apply to the estate of an alien residing out of British India, just as the Bombay Minors Act (XX of 1864) does not apply to minors who are not resident within the Presidency of Bombay. Then, as to Act XVIII of 1848, the sanction of Government is not necessary for the institution of the suit. It must be obtained before any writ, summons, or other process is issued to any of the members of the Navá'b's family.

[WEST, J.:—You need not discuss this point. We agree with the Court below that the consent of Government is not necessary for the institution of the suit.]

V. K. Dhairyaván for respondent No. 2.

WEST, J.:—The necessity for a certificate under Act XXVII of 1860 in this case is not clearly established. Section 3 of the Act seems to contemplate the issue of a certificate under it only for the estate of a British subject, either resident within the district where a certificate is sought, or else having no fixed place of residence. Here, the deceased Mir Bakar Ali was a *sardár* of Baroda, resident there, where also he died. The representation of such a person would properly be sought in the country he belonged to, and the constituted representative would then sue, or empower some one to sue, in the British Courts. The Act does not make provision for the administration of the effects of a foreigner domiciled abroad. The plaintiffs, however, were, no doubt, bound in some way to establish their representative character, and the certificate sought, under Act XXVII of 1860, was not taken out.

While Act XXVII of 1860 has regard to the person, Regulation VIII of 1827, on the other hand, looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration. It is unskilfully worded, but the intention of section 9 seems to be that, when there are assets

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within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. Under this section it has been held that there must be a separate certificate for each *zilla* where property has to be administered, and the mere presence of property seems enough to found the jurisdiction. The authority given to the administrator under section 9, as no other provision is made on the subject, must be understood to be the same as under section 7.

The certificate in the present case was after Mir Bakar Ali's death granted to Mr. Lely. He gave notice, as administrator, to the now defendants to pay the debt claimed in this suit to him as administrator. He has never, it is admitted, been relieved of his office as administrator by the Court, as contemplated in the section under which he was appointed. His *status* subsists still, and while it subsists, no one else can represent the estate. The appointment of an administrator excludes other representatives so long as it endures. The plaintiffs, therefore, were incompetent to bring the present suit. There is strong reason to suppose that they have been met by accounts that have been unfairly tampered with,—a fault for which the defendants are at least civilly answerable. We confirm the decree of the Subordinate Judge in this sense, that we dismiss the suit as incompetently brought, but we direct that the parties respectively are to bear their own costs throughout.

Decree confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

SHRI SIDHESHWAR PANDIT, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRI HARIHAR PANDIT, (ORIGINAL DEFENDANT), RESPONDENT.* 1887. *July* 20.

Jurisdiction—Act XIV of 1869, *Secs.* 23 *and* 24—*Subordinate Judge appointed to assist another Subordinate Judge, powers of—Second appeal, objection to jurisdiction on—Practice.*

Where a Subordinate Judge is deputed, under section 23 of Act XIV of 1869, to assist another Subordinate Judge, the assistance by the Judge so deputed can only be afforded within the limits of his jurisdiction as fixed by section 24 of the Act, and cannot be invoked, except in matters within his competence.

The plaintiff having obtained a decree against the defendant in a suit in which the subject-matter of the suit and the amount of the decree exceeded Rs. 5,000 in the Court of a Subordinate Judge of the First Class, presented it in that Court for execution. The Subordinate Judge transferred it for execution to the Second Class Subordinate Judge who had been appointed, under Act XIV of 1869, to assist him, and whose jurisdiction extended to Rs. 5,000 only. The Second Class Subordinate Judge ordered execution to issue. The defendant appealed, and this order was reversed. The plaintiff appealed to the High Court, and raised, for the first time, an objection that the Second Class Subordinate Judge had no jurisdiction to entertain the application for execution. The defendant contended that this objection was taken too late on second appeal.

Held, that the Second Class Subordinate Judge had no jurisdiction to entertain and deal with the plaintiff's application for execution, and that the plaintiff's objection should be allowed. An objection to the jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings.

THIS was a second appeal from a decision of Sir William Wedderburn, District Judge of Poona.

The plaintiff instituted this suit, the subject-matter of which was over Rs. 5,000, in the Court of the First Class Subordinate Judge at Poona, and obtained a decree against the defendant, which was also over that amount. He subsequently applied to the same Court for execution of his decree, but the Subordinate Judge transferred the decree for execution to the Second Class Subordinate Judge, who had been deputed, under section 23 of Act XIV of 1869, to assist him. The Second Class Subordinate Judge passed an order sanctioning execution; but the defendant appealed from that order, and it was reversed by the District Judge.

* Second Appeal, No. 212 of 1885.

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The plaintiff now preferred a second appeal to the High Court, and contended, for the first time, that the Second Class Subordinate Judge had no power to deal with the execution of the decree, which had been transferred to him by the First Class Subordinate Judge. The defendant contended that the plaintiff's objection to the jurisdiction was too late on second appeal.

Viccáji (*Pándurang Balbhadra* with him) for the appellant:—The First Class Subordinate Judge, who had passed the decree, and to whom application had been made, ought not to have transferred the execution to the Joint Second Class Subordinate Judge, as the subject-matter of the suit was over Rs. 5,000. The Second Class Subordinate Judge was appointed under section 23 of Act XIV of 1869, and his jurisdiction could be invoked only in matters within his pecuniary jurisdiction, which was limited to Rs. 5,000. The decree in question would be executed without jurisdiction if the order for execution by the Second Class Subordinate Judge were upheld. Though the appellant did not, at first, object to the jurisdiction, he can now object on second appeal. Consent or acquiescence of parties does not give jurisdiction to Courts in matters beyond their jurisdiction—*Bábáji* v. *Lakshmibái*[1]. An objection to jurisdiction can be taken at any time, and here the appellant applied to the competent Court: he should, therefore, be allowed now to object on second appeal—*Geeasoodin* v. *Rámchandra Hanmant Risbood*[2]; *Nidhi Lál* v. *Mazhar Husain*[3]. If the objection to jurisdiction is patent on the face of the record, it can be taken on second appeal—*Bápuji* v. *Umedbhai*[4].

Mahádev Chimnáji Apte for the respondent:—The objection to jurisdiction is taken too late. The appellant submitted to the jurisdiction of the Second Class Subordinate Judge when execution was allowed by him to issue, and even took money under the order. He is estopped from objecting now. Here for the first time he objects to the jurisdiction. Objection to jurisdiction cannot be taken on second appeal—*Pándoji* v. *The Collector of Poona*[5]. The Second Class Subordinate Judge was

(1) I. L. R., 9 Bom., 266.
(2) I. L. R., 7 All, at p. 243.
S. A. 323 of 1872, No. 17 of 1872.
(4) 8 Bom. H. C. Rep., 245, A. C. J.
(5) Printed Judgments for 1870, p. 103.

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appointed to assist the First Class Subordinate Judge, and the latter could transfer the execution of the decree, and such an act would not be *ultra vires*.

SARGENT, C. J.:—The plaintiff who presented his *darkhást* in the Court of the First Class Subordinate Judge, has taken the objection, that the Subordinate Judge of the Second Class had no jurisdiction to adjudicate on the *darkhást*, the subject-matter both of the suit and of the *darkhást* being above 5,000 Rs The Subordinate Judge, it appears, had been appointed, under section 23 of Act XIV of 1869, to assist the First Class Subordinate Judge in the disposal of the suits on his file, and was directed by the latter to dispose of the *darkhást* in question. The assistance, however, contemplated by that section could only be afforded within the limits of a Second Class Subordinate Judge's jurisdiction as fixed by section 24 of Act XIV of 1869, and could not, therefore, be invoked by the Subordinate Judge of the First Class, except in matters within his competence. The execution of the decree by section 223 of the Civil Procedure Code belongs to the Court which has pronounced it, and as the Second Class Subordinate Judge could not have entertained the suit, so neither could he deal with it in execution. We, therefore, think that the plaintiff is right in his contention that the Subordinate Judge of the Second Class had not jurisdiction to entertain the *darkhást*.

But it has been urged for the defendant that this objection cannot be taken by the plaintiff, or, at any rate, not on second appeal for the first time. As a general rule, an objection to the jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings—see *Geesoodin* v. *Rámchandra Hanmant Risbood*[1] and the remarks of Mahmood, J., in *Nidhi Lal* v. *Mazhar Husain*[2]; and as the plaintiff presented his plaint in the proper Court, there seems no sufficient reason why he should not have the same right to object to the jurisdiction of the Judge who tried the case as the defendant would have had had the decision been against him.

We must, therefore, discharge the orders of both the Courts below, and direct that the plaintiff's *darkhást* be disposed of by

(1) S. A. 323 of 1872, No. 17 of 1872.

(2) I. L. R., 7 All., at p. 243.

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the First Class Subordinate Judge As the plaintiff presented his *darkhást* in the right Court, the parties must pay their own costs throughout up to the present time.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt, Chief Justice, and Mr Justice Nánábhái Haridás

1887 *August* 16.

HARI GOPA L, (ORIGINAL PLAINTIFF), APPELLANT, v GOKALDA'S KUSHABA'SHET, (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Joint family—Manager—Parties to suit—Practice—Suit by manager alone—Co-parceners made parties on objection by defendant—Civil Procedure Code (Act XIV of 1882), Sec. 30—Amendment of pleadings—Plaint amended in second appeal by adding parties

The plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant The defendant contended that the plaintiff's minor brother and uncle, who were his undivided co parceners, should be made parties to the suit The Court of first instance held that the plaintiff, as manager, could sue alone and passed a decree for the plaintiff The first appellate Court reversed the decree, holding that the plaintiff could not sue alone, except under the provisions of section 30 of the Civil Procedure Code, which had not been complied with On second appeal to the High Court,

Held, that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co plaintiffs or as defendants The right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, and, therefore, the defendant is always entitled in such suits, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record, to ensure him against the possibility of the plaintiff's acting without authority

The plaintiff was allowed on second appeal to amend his plaint by making the other members of the family parties to the suit

SECOND appeal from a decision of Ráv Bahádur K. B. Bal, First Class Subordinate Judge with appellate powers at Thána.

The plaintiff as manager of an undivided Hindu family sued the defendant to recover possession of certain lands. The defendant contended that the plaintiff's minor brother and uncle, who were his co-parceners, should be made parties in the suit as co-plaintiffs.

* Second Appeal, No 375 of 1885.

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The Court of first instance held that the plaintiff could sue alone as manager of the family, and awarded the plaintiff's claim.

The lower appellate Court, on appeal by the defendant, reversed the lower Court's decree, on the ground that the plaintiff could not sue alone, except under the provisions of section 30 of the Civil Procedure Code (Act XIV of 1882), which had not been complied with.

The plaintiff appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant:—The plaintiff could sue alone as manager. It is only in cases where there are joint debts that all the co-parceners must be made parties. A decree against the manager binds the other co-parceners. He can, therefore, as a plaintiff represent them. A manager is entitled to bring a suit to establish a right belonging to the family without making other members parties to the suit—see *Arunachala Pillai* v. *Vythialinga Mudaliyár*[1].

Section 30 of the Civil Procedure Code (Act XIV of 1882) does not apply to a case like this. If necessary, the plaint may now be amended.

Shivrám Vithal Bhandárkar for the respondent:—All co-owners must be parties, otherwise the suit must be dismissed—*Kálidás Kevaldás* v. *Nathu Bhagván*[2]. As between the members of a joint family, any one member may sue, but a defendant is entitled to have the other co-owners joined as parties. Such joinder is necessary for the protection of the defendant: see *Ramsebuk* v. *Rámlálí*[3]. A mere allegation in the plaint, that the plaintiff sues as manager, is not sufficient to cure the defect of non-joinder of parties—see *Bálkrishna Moreshvar Kunte* v. *The Municipality of Mahád*[4]. The lower appellate Court was right in holding that the suit was not properly constituted under section 30 of the Civil Procedure Code (Act XIV of 1882). Section 32 does not make it discretionary with the Court to add parties. The plaintiff should be allowed on second appeal to amend the plaint by adding parties.

(1) I. L. R., 6 Mad., 27.
(2) I. L. R., 7 Bom., 217.
(3) I. L. R., 6 Calc. 815.
(4) I. L. R., 10 Bom., 32.

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SARGENT, C. J. :—The plaintiff in this case sued in ejectment as the manager of the undivided family of the deceased Gopál Yadneshwar, to recover possession of the land mentioned in the plaint The defendant by his written statement took the objection that the other members of the family, mentioning more particularly a minor brother and uncle of plaintiff, should be made parties to the suit. An issue was framed, raising the question whether plaintiff could sue alone. The Subordinate Judge held that the manager of a Hindu family could institute and defend suits on behalf of the family. The lower Court of appeal held that he could not do so without conforming to the provisions of section 30 of the Code. That section enables (with the permission of the Court) one of several persons having the same interest in a suit to sue on behalf of all, by giving notice through the Court to all the parties concerned, in manner therein mentioned, and where the party suing does not, in the eye of the law, represent all the persons intended for the purpose of suing and being sued, but here it is contended by the plaintiff, and was so held by the Subordinate Judge, that, as the manager of an undivided Hindu family, he fully represents the other members of the family for the purpose of litigation, and that the suit is properly framed by the mere statement contained in it that plaintiff sues as manager of the family. However this may be as between the members of the family, it is plain that the right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, whose assent is usually required in important matters, and we think, therefore, that the defendant is always entitled, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record to insure him against the possibility of the plaintiff's acting without authority. Moreover, the reasons which are given in *Kálidás Kevaldás* v. *Nathu Bhagván* [1] for requiring the other members of the family to be made parties, are equally applicable, whether or no the plaintiff describes himself in the plaint as suing as manager of the family. On both grounds

[1] I. L. R., 7 Bom., 217

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we think, therefore, that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co-plaintiffs or defendants.

We think, however, that under the circumstances of this case, and having regard to the state of the law on the subject, the plaintiff should be, and we hereby direct that he be allowed to amend his plaint by making the other members of the family mentioned by the defendant parties to the suit, and reverse the decree of the Court below for that purpose. Such amendment to be made within a month of the papers being received by the Court of first instance, but, in default, the decree of the lower Court of appeal is to stand confirmed. In any case, the plaintiff must pay the defendant his costs up to the present time

REVISIONAL CRIMINAL.

Before Mr Justice West and Mr. Justice Birdwood.

IN *RE* JA'NKIDA'S GURU SITA'RA'M.*

1887 *August* 17.

Criminal Procedure Code (Act X of 1882), Secs. 155, 202, 203—Magistrate's power to direct a local investigation by the police—Complaint of an offence cognizable by a Magistrate—Examination of complainant.

Section 155 of the Code of Criminal Procedure (Act X of 1882) deals only with the powers of police officers. It confers no power or authority on Magistrates to direct a local investigation by the police, or call for a police report.

It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he can take cognizance, to refer the complaint to a police officer. He is bound to receive the complaint, and after examining the complainant to proceed according to law.

THIS was an application for the exercise of the revisional jurisdiction of the High Court under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant Jánkidás lodged a complaint before Mr. Ryan, the Acting Second Presidency Magistrate, charging one Gangádás and twelve other persons with criminal trespass and house-trespass, under sections 447 and 448 of the Indian Penal Code (Act XLV of 1860). He alleged that he was the *pujári* and manager of the temple of Shri Mahádev at Núgpáda, that on the 13th June,

* Criminal Revision ; Application No. 157 of 1887.

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1887, at about 8 o'clock in the morning, the accused unlawfully entered the temple during his absence, assaulted his brother's widow, who was then engaged in worshipping the idol, and turned her out by force; that the tenants, who came to her rescue, were also assaulted and turned out; and that when he himself returned soon afterwards he found the temple closed, and some of the accused standing near the entrance, and that they used abusive and threatening language towards him.

The Magistrate referred this complaint to the police for inquiry and report. On receipt of the police report he refused to interfere in the matter.

The complainant thereupon applied to the High Court for a revision of the Magistrate's proceedings.

Ganpat Sadáshiv Ráv for the complainant:—The Magistrate's action was irregular. He had no power to refer the complaint to the police for investigation or for report. Such power is given only to the Chief Presidency Magistrate: see section 202 of the Code of Criminal Procedure (Act X of 1882). Under section 203 the Magistrate is bound to examine the complainant before he dismisses the complaint. In the present case the complainant was not examined; nor was any order made dismissing the complaint. The proceeding is irregular and illegal, and should, therefore, be set aside. He referred to *Queen-Empress* v. *Puran*[1] and *Baidya Nath Singh* v. *Muspratt*[2].

At this stage the Court (West and Birdwood, JJ.,) adjourned the further hearing of the case, and directed the Magistrate to state whether he was empowered by the local Government, under section 202 of the Code of Criminal Procedure, to order a local investigation to be made by the police, or to call for a police report.

The Magistrate made the following report:—

"The undersigned has the honour to report that a Presidency Magistrate is authorized by section 155 of the Criminal Procedure Code (Act X of 1882) to direct the police to make an investigation in non-cognizable cases.

(1) I. L. R., 9 All., 85. (2) I. L. R., 14 Calc., 141.

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"The camplaint made by Jánkidás Sitárám Báwá against Gangádás Jamnádás and twelve others alleged that they had committed criminal trespass on the premises of the temple at Nágpádá, and as it appeared the police had already taken action with a view to prevent any possible breach of the peace, the information presented by the complainant was forwarded to the police superintendent of the district for inquiry and report.

"A second information was presented by Jánkidás, superadding a charge of theft, and this being a cognizable offence he was directed to make his complaint, in the first instance, to the police superintendent, to whom also the second information was forwarded.

"It does not appear that the local Government has authorized the Presidency Magistrate to direct a local investigation by a police officer under section 202 of the Criminal Procedure Code (Act X of 1882). But a Magistrate having a jurisdiction appears, by intendment and implication of the law, to possess such a discretional authority in cognizable cases."

On receipt of this report the Court (West and Birdwood, JJ.,) made the following order :—

Section 155 is conversant only with the powers of police officers. It confers no power or authority on Magistrates. Section 202 enables only the Chief Presidency Magistrate to direct a local investigation by the police, except when a like authority has been specially conferred on a Presidency Magistrate of lower rank.

It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he has cognizance, to refer the complainant to a police officer. He is bound, when the circumstances giving him jurisdiction exist, to receive the complaint, and deal with it according to law. A different course would foster abuses, and defeat the purpose of the law, which is to give to persons, who have been injured, an access to justice independent of the police.

The Magistrate, therefore, will take the examination of the complainant, and proceed thereon according to law.

Proceedings set aside.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *August* 17.

HORMUSJI NAVROJI, (ORIGINAL APPLICANT), APPELLANT, *v.* BA'I DHANBA'IJI, JAMSETJI DOSA'BHA'I, AND OTHERS, (ORIGINAL CAVEATORS), RESPONDENTS.*

Will—Letters of administration—Citation—Defective citation—Revocation of letters of administration—Probate, nature and effect of—Act V of 1881, *Secs.* 16 *and* 50.

S., a Pársi, died, leaving a will, whereby he directed that after his death his estate should be managed by his widow Jivibái, and after her death by his sister-in-law Hirábái, and after Hirábái's death by the appellant, his adopted son Hormusji. On Jivibái's death the testator's brother Dosábhái applied for letters of administration, and issued a citation to the appellant Hormusji. Hirábái entered a caveat. No further proceedings were taken, and the matter remained pending. On Hirábái's death, Dosábhái applied for a fresh citation to the appellant Hormusji, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to Dosábhái. The appellant Hormusji subsequently applied for probate of the testator's will. The respondents filed caveats, alleging that the will was void, on the ground of certain bequests contained in it. They further contended that as the appellant had been cited to appear when application was made by Dosábhái for letters of administration, he could not now apply to have letters of administration cancelled.

Held, that the letters of administration granted to Dosábhái should be revoked, and that probate should be granted to the appellant. The only citation which had been issued to the appellant was in 1882, when Dosábhái commenced his proceedings to obtain letters of administration. At that time Hirábái, who was the executrix named in the will (the appellant Hormusji being only named as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship. On Hirábái's death, however, which took place before the actual grant of administration was made to Dosábhái, such a citation was necessary, under section 16 of Act V of 1881, before the grant could be legally made. In default of such a citation the proceedings were defective in substance—a circumstance which constituted good cause for the revocation of the letters of administration, under section 50 of Act V of 1881.

Held, also, that the District Judge was wrong in refusing probate of the will, on the ground that the bequests contained in it were illegal and void. Probate is only conclusive as to the appointment of executors and the validity and contents of the will; and in an application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

THIS was an appeal against an order of E. T. Candy, District Judge of Surat, in application No. 11 of 1884 under Act X of 1865.

* Appeal No. 52 of 1885.

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HORMUSJI NAVROJI v. BÁI DHANBÁIJI, JAMSETJI DOSABHAI.

By his will, dated the 10th September, 1877, one Shápurji, a Pársi, left the management of his estate to his wife, and after her death certain others of his relatives.

The material portion of the will, as stated by the District Judge in his judgment, was to the following effect:—"After the testator's death, his wife Jivibái should manage his estate, and from its revenue she should, according to testator's religion, defray the entire expenditure incurred on account of the anniversaries of the deceased parents of the testator and Jivibai and of the *doslá* and *gambhár* of the dead. During her life, Jivibái was to be the sole owner of the estate, on her death, Hirábái, wife of testator's brother Navroji, was to manage the estate and defray Jivibái's funeral expenses, as mentioned above, together with all the expenses on account of the anniversaries, *doslás*, &c. On Hirábái's death, Hormusji, son of testator's brother and adopted son of testator, was to manage the entire estate and defray the above expenses. On his death, his wife Dosibái and his sons Sorábji and Kharsedji were to be the managers, as above described, and defray all the said expenses." On Jivibái's death, in 1882, Dosábhái, the testator's brother, applied for letters of administration, and the appellant Hormusji, the nephew and adopted son of the testator, was cited, but he failed to appear. Hirábái, however, who was then alive, entered a caveat, and the matter remained pending till the death of Hirábái, which took place in February, 1884.

On the death of Hirábái, Dosábhái applied to the District Judge for a fresh citation to the appellant Hormusji, which the Judge thought was unnecessary, and he then granted letters of administration to Dosábhái

The appellant Hormusji having now applied for probate of the will, the respondents Dhanbáiji and Jamsetji, who were the children of another brother of the testator and his brother Dosábhái, filed caveats, impeaching the will as void by reason of certain provisions therein The caveators contended *(inter alia)* that the letters of administration which had already been granted to Dosábhái should be cancelled before probate could be granted to Hormusji, and Dosábhai further contended that the appellant's

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application for probate could not now be heard, as he had already been twice cited, and had omitted then to apply for probate. The District Judge held the will void, and refused to grant probate.

Hormusji thereupon appealed to the High Court.

Gokuldás Kahándás, for the appellant, relied on *Behary Lall Sandyál* v. *Juggo Mohun Gossain*(1), and contended that the Judge was wrong in entering into the question of the validity of the will, which had been proved.

Jardine, (*Mánekshán Jehángirshán* and *Motilál Mugutlál Munshi* with him) for the respondents:—The appellant's omission to appear when he was cited on previous occasions disentitles him now to probate. The present application of the appellant is rather one for the revocation of the letters of administration than for probate. A person who has been cited, and fails to appear at the time probate is granted, cannot afterwards get it cancelled—*In re Pitámber Girdhar*(2). See also sections 16 and 50 of Act V of 1881.

SARGENT, C. J.:—The question in this case arises upon a refusal of the District Judge to grant probate of the will of one Shápurji Nasarwánji to Hormusji Navroji, on the ground that the bequests contained in it are illegal and void. The probate is only conclusive as to the appointment of executors and the validity and the contents of the will—Williams on Executors, p. 452 (4th ed.); and on the application for probate it is not the province of the Court to go into the question of title, with reference to the property of which the will purports to dispose, or the validity of such disposition—*Behary Lall Sandyál* v. *Juggo Mohun Gossain*(3).

But it has been contended that as Hormusji was cited on Dosábhái's second application for letters of administration in 1882, the grant of administration to him cannot now be revoked. It appears, however, that when those proceedings were commenced, and when Hormusji was cited, Hirábái, who was the executrix named in the will (Hormusji being only named in the will as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship,

(1) I. L. R., 4 Calc., 1. (2) I. L. R., 5 Bom., 638 at p. 641.
(3) I. L. R., 4 Calc., 1.

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On Hirábái's death, however, which took place before the actual grant of administration to Dosábhái, such a citation was imperatively required by section 16 of Act V of 1881 before the grant could be legally made, and, therefore, in default of such citation, the proceedings were defective in substance—a circumstance which constitutes good cause for the revocation of the letters of administration, as provided by section 50 of the above Act. We must, therefore, discharge the order, and direct that the letters of administration granted to Dosábhái be revoked, and probate be granted to Hormusji, in accordance with his application.

The applicant to have his costs here and in the Court below.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Birdwood.

IN *RE* HOWARD.*

Defamation—Republication of defamatory matter already published—Indian Penal Code (Act XLV of 1860), Sec. 499—Dismissal of complaint—Criminal Procedure Code (Act X of 1882), Sec. 203.

A complaint was filed, under section 499 of the Indian Penal Code, against the proprietors, editor, and printer of a newspaper for publishing matter alleged to be defamatory. The Magistrate, before whom the complaint was lodged, found that the publication complained of was a mere reproduction or republication of what had been previously printed and published in another newspaper. He was, therefore, of opinion that, unless and until criminal proceedings had been taken in respect of the earlier publication, a charge of defamation could not properly be brought with regard to the later publication. He, therefore, dismissed the complaint, under section 203 of the Code of Criminal Procedure (Act X of 1882).

Held, that the order of dismissal was improper. The Indian Penal Code (sec. 499) makes no exception in favour of a second or third publication as compared with a first. If the complaint is properly laid in respect of a publication which is *primâ facie* defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law.

THIS was an application under the criminal revisional jurisdiction of the High Court, under section 435 of the Code of Criminal Procedure (Act X of 1882).

The applicant Howard lodged a complaint in the Court of the Chief Presidency Magistrate, charging the proprietors, editor, and printer of a Bombay newspaper, called the *Advocate of India*, with defamation.

* Criminal Revision; Application No. 172 of 1887.

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The charge was laid in respect of three paragraphs or reports published in that paper under date the 21st and 24th August, 1886, and 30th September, 1886, respectively. The alleged defamatory paragraphs purported to be extracts from other newspapers, called the *Poona Observer* and the *Dekkan Herald*, which contained reports of certain criminal proceedings instituted against Howard at Poona.

The Magistrate, after examining the complainant, dismissed the complaint, under section 203 of the Code of Criminal Procedure (Act X of 1882). Being of opinion that until the *Poona Observer* and the *Dekkan Herald* had been prosecuted and convicted of defamation in respect of the original reports which were alleged to be defamatory, no charge of defamation would lie against the *Advocate of India* for merely reproducing the reports already published by the Poona newspapers. He also held that the complaint was one of a frivolous and vexatious character, intended to insult and annoy the owners and staff of a newspaper, with the management of which the complainant was at enmity.

Against this order of dismissal, Howard made the present application to the High Court, under section 435 of Act X of 1882.

The Court (West and Birdwood, JJ.,) sent for the record and proceedings of the case, and after hearing the applicant in support of his application made the following order:—

WEST, J.:—It appears from the decision of the Magistrate in disposing of the case, though the matter is not brought out with absolute clearness, that he was under the impression that when a previous publication of the alleged defamatory matter had occurred, the subsequent republication could not properly be made the subject of prosecution until that course had been taken with regard to the earlier publication. This, however, is not law. The Indian Penal Code makes no exception in favour of a second or third publication as compared with a first; and such an exception would obviously be made a means of defeating the principal provision of the law of defamation. In England it is not allowed to a defendant to prove that a statement, similar to the one for which he is indicted, has been previously published by

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persons who have not been prosecuted (see *Reg.* v. *Holt*[1]); and the repetition of a common rumour, however prevalent, is not received as an excuse for its further promulgation (*Waithman* v. *Weaver* [2]); nor, according to the English law, is the recovery of damages against one journal accepted even as mitigation in an action against another journal for a repetition of the libel (*Reg* v. *Kerr* [3]). It will be necessary, and we direct the Chief Presidency Magistrate to resume the consideration of the complaint in this case, directing his attention to the particulars thereof with reference to the principles we have indicated, and he will thereon give his decision on the complaint with regard to the following points:—1, the veracity and good faith of the complaint, 2, the legal responsibility of the persons accused, and each of them; 3, as to the fact of publication; and, 4, with regard to the nature of the publication as penally defamatory or otherwise. The order of the Magistrate dismissing the complaint is reversed, in order that he may proceed in the course we have thus prescribed.

Order reversed.

(1) 8 Cox. C C., 411. (2) 11 Price, 257, *note*. (3) 8 C. & P., 177.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr Justice Nánábhái Haridás.

MOHANLA'L RAICHAND, (PLAINTIFF), *v* VIRA' PUNJA AND OTHERS, (DEFENDANTS) *

1887. *September* 1.

Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 15.

The plaintiff, who was a money lender residing within the limits of the Ahmedábád Cantonment, sued the defendants, who resided within the jurisdiction of the City Small Cause Court at the same place, upon a bond executed by them at the cantonment. He presented his plaint to the Cantonment Magistrate, whose pecuniary jurisdiction extended to Rs 200 only; but that officer, being of opinion that the suit was cognizable by the City Small Cause Court, returned it to the plaintiff, who subsequently presented it to the Judge of the City Small Cause Court, whose pecuniary jurisdiction extended to Rs 500. On reference by him to the High Court,

* Civil Reference, No. 31 of 1887

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Held that both the Courts had jurisdiction to try the suit, but that the Court of the Cantonment Magistrate was to be regarded as the Court of lower grade, and, therefore, under section 15 of the Civil Procedure Code (Act XIV of 1882), was the proper Court to try the suit.

Dwárkanáth Dutt v. *Bhathu Hawoldar* (1) referred to and followed.

THIS was a reference by Khán Bahádur Navroji Dorábji, Acting Judge of the Court of Small Causes at Ahmedabad, under section 617 of the Civil Procedure Code (Act XIV of 1882). It was as follows :—

"The plaintiff in this case sought to recover from the defendants the sum of Rs. 108, due on a bond dated 30th December, 1884. The plaintiff is a money-lender residing within the limits of the Ahmedabad Cantonment, and it is stated in the plaint that the defendants executed the bond at the cantonment, where the cause of action, therefore, arose. The defendants, however, are residents of Mauje Naroda, in Daskroi Táluka, within the jurisdiction of the City Small Cause Court.

"The plaintiff at first brought the plaint to be presented to the City Small Cause Court, but on learning that the Cantonment Magistrate also had jurisdiction, he presented the plaint there with an application to have it filed in that Court. The Cantonment Magistrate, however, returned the plaint with an endorsement on the plaintiff's application that, according to section 8 of Act XI of 1865, the plaint should be filed in the City Small Cause Court. On the plaintiff's presenting his plaint to the City Small Cause Court it was returned to him with an endorsement thereon that, according to section 15 of the Civil Procedure Code, the suit should be instituted in the Court of the Cantonment Magistrate. The plaintiff, therefore, again took the plaint to the Cantonment Magistrate, who returned it with an endorsement that, according to section 17 of the Civil Procedure Code, clause (*b*), the suit ought to lie in the City Small Cause Court."

The plaintiff having re-presented his plaint in the City Small Cause Court, the latter referred the following questions to the High Court for decision :—

1. Is the Court of the Cantonment Magistrate at Ahmedabad with Small Cause Court jurisdiction within the cantonment up

(1) 22 Calc. W. R. Civ. Rul., 457.

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to Rs. 200 to be considered a Court of "the lowest grade" within the meaning of section 15 of the Civil Procedure Code, in reference to the Small Cause Court at Ahmedabad, which also has jurisdiction within the cantonment?

2. And if so, whether the present plaint should not be filed in the Court of the Cantonment Magistrate at Ahmedabad?

Mahádev Bhásker Chaubal for the plaintiff.—Both the Courts have jurisdiction to try the suit. Under section 15 of the Civil Procedure Code (Act XIV of 1882) the suit should be instituted in the Court of the lowest grade competent to try the cause, and as the Court of the Cantonment Magistrate had jurisdiction up to Rs. 200, and the amount sued for did not exceed it, his Court was the proper Court See *Dwárkanáth Dutt* v. *Bhathu Hawoldar*[1].

Vishnu Krishna Bhátvadekar for the defendant.

SARGENT, C. J.—Both Courts had jurisdiction to try the cause—the Small Cause Court of the cantonment, because the cause of action arose within the local jurisdiction, and the Small Cause Court of the City, because the defendant resided there: but the former, whose jurisdiction only extends to Rs 200, whilst that of the latter extends to Rs. 500, must, we think, be regarded as the Court of lower grade, and, therefore, under section 15 of the Civil Procedure Code (Act XIV of 1882), the proper Court to try the suit. See *Dwárkanáth Dutt* v. *Bhathu Hawoldar*[1].

(1) 22 Calc W. R. Civ. Rul, 457.

ADMIRALTY JURISDICTION.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr Justice Farran

1887
April 26.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, (PLAINTIFFS), *v.* THE S. S. "ZUARI", (DEFENDANT).*

Practice—Review of judgment—No appeal from order granting review—Civil Procedure Code (Act XIV of 1882), Sec. 629.

No appeal lies from an order granting a review of judgment, except in the cases set forth in section 629 of the Civil Procedure Code (Act XIV of 1882).

IN this suit, which arose out of a collision at sea, a decree for the plaintiffs was passed on the 14th April, 1887. On the 21st

* Admiralty Suit No 7 of 1886.

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April the defendant applied for a review of judgment, on the ground of certain statements alleged to have been made, after the case had been concluded, by a person who had been examined as a witness for the plaintiffs at the trial, to the effect that, "if he had told the truth, things would have gone differently", and stating facts which, if true, would have affected the plaintiffs' case. On the 25th an order was made by Bayley, J., granting the review applied for. The plaintiffs appealed.

Russell, for the respondent, raised the preliminary point that no appeal lay from an order granting a review. He contended that section 629 sets forth the only cases in which an appeal from an order granting a review is permitted; and that this case did not come within any of those clauses. He referred to *Abdul Rahim* v. *Racharai*[1]; and, as to the old practice, Broughton's Civil Procedure Code, at p. 295.

Macpherson, (Acting Advocate General), for the appellants, *contra*.

SARGENT, C. J.:—This is an appeal from an order of Mr. Justice Bayley granting a review. A preliminary objection has been taken, that in the present case no appeal lies from that order.

Section 623 of the Civil Procedure Code is the first section dealing with the subject of review, and it states the circumstances under which a review may be applied for. Then come sections 624, 626, and 629, which are the material sections in dealing with the case now before us. The last of these sections provides that there shall be no appeal against an order refusing a review, but that there may be an appeal against an order granting a review, where such order is "*(a)* in contravention of the provisions of section 624, or *(b)* in contravention of the provisions of section 626, or *(c)* after the expiration of the period of limitation prescribed therefor, and without sufficient cause."

The question now before us is, whether the order of Bayley, J., allowing a review was "in contravention of the provisions of section 626;" and to decide this we have to consider whether these words, which are used in clause *(b)* of section 629, mean that there may be an appeal on the ground that there was not "sufficient

(1) I. L. R., 1, All., 363.

ground" for granting the review,—in other words, an appeal on the merits generally, or only on the ground that the Court has granted the review without first coming to a conclusion that there was "sufficient ground", or without notice of the application for review having been given to the opposite party, or without strict proof of the allegation referred to in proviso *(b)*.

We think that the latter is the true construction of this clause, and that there is no contravention of the provisions of section 626, if the Court, to which the application has been made, was of opinion that the review should be granted, and if the rules laid down in the provisos have been observed.

In the present case we understand that the learned Judge, who made the order, was of opinion that there was sufficient ground for review, and he accordingly granted the application. It is not contended that there has been any violation of the rules contained in the provisos to section 626, and we must, therefore, hold that there is no appeal from the order.

FARRAN, J. :—I am of the same opinion. Section 629, clause *(b)*, gives the right to appeal against an order granting a review only where the provisions of section 626 have been contravened. These provisions are four in number, *viz.*, (first) that, if the Court be of opinion that the application for review should be granted, it shall grant the same; (second) that the Judge shall record his reasons for granting it; (third) that the party applying for review shall give previous notice of his application to the opposite party; and (fourth) that where the applicant for review alleges that the new matter or evidence, the discovery of which is the ground of his application, was not within his knowledge when the decree was passed, he shall give strict proof of that allegation. In the present case no one of these four provisions has been contravened, and there is, therefore, no appeal against the order granting the review.

Appeal dismissed with costs.

Attorneys for the appellants :—Messrs. *Winter and Burder.*

Attorneys for the respondent :—Messrs. *Chalk, Walker, and Smetham.*

ORIGINAL CIVIL.

Before Sir C. Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1887. *September* 23.

KARIM MAHOMED JAMA'L AND ANOTHER, (PLAINTIFFS), *v.* RAJOOMA' AND NOORBA'I, (DEFENDANTS).*

Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Res judicata—Practice—Objection taken at hearing that the application made to Court was not the application of which notice had been given to opposite party—Preliminary point.

The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September, 1871, by which certain landed properties were to be divided, as specified in the agreement, between them and the defendants. The case came on for hearing on the 13th September, 1878. The defendants did not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, and referred the suit to the Commissioner for the preparation of conveyances, &c. The decree was sealed on the 9th October, 1878. No further steps were taken by any of the parties for six years, and in September, 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order, being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November, 1884, gave notice to the plaintiffs, that they would apply to the Court—(1) "to set aside or vary its order of the 13th September, 1878, so far as it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September, 1885, on which day it was dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April, 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September, 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs

* Suit No. 667 of 1877.

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and defendants respectively. The defendants contended that the application was barred by lapse of time, and that the question was *res judicata* by the order of the 10th September, 1885.

Held, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, as against the plaintiffs having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them.

Held, also, that the motion was not *res judicata* by reason of the previous order of the 10th September, 1885. Although the notice of motion then served by the defendants on the plaintiffs included matters in respect of which the defendants sought relief by their present application, the Judge in making the order dealt with them as ancillary to the first and main point raised in that motion, *viz.*, the defendants' right to set aside the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and, therefore, the present application in respect of those matters was not *res judicata*.

Counsel for the plaintiffs contended that the defendants were not entitled, on the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised.

Held, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to the Court was acquiesced in. The objection was then too late.

MOTION.—The plaintiffs brought this suit, in 1877, against the defendants, to obtain specific performance of an agreement dated the 27th September, 1871.

The defendants were the daughters of one Tájoobhoy Kállábhoy, who died intestate in May, 1869, leaving a considerable amount of moveable and immoveable property. The first plaintiff was the nephew and the second plaintiff was the sister of the said Tájoobhoy.

In July, 1869, the defendants applied for joint letters of administration to their father. The plaintiffs thereupon entered caveats. In July, 1870, the second plaintiff assigned her interest in the estate of the intestate to the first plaintiff, Karim Mahomed Jamál.

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On the 27th September, 1871, by a registered memorandum of agreement it was agreed between the defendants and the plaintiffs that the caveats entered by the plaintiffs should be dismissed, and that joint letters of administration to the estate of Tájoobhoy should be issued to the defendants, and that, with reference to the estate of the said Tájoobhoy, the following arrangement should be carried out :—

(1) Certain properties, specified in schedule A annexed to the agreement, were to go to the plaintiffs as their share.

(2) Certain other properties, specified in schedule B, were to go to defendants as their share.

(3) A property mentioned in schedule C was, after certain preliminaries, to be divided between the plaintiffs and the defendants.

On the 25th September, 1877, the plaintiffs filed this suit for specific performance of the above agreement. In their plaint they stated that they were ready and willing on their part to carry out the agreement; and they prayed (1) for specific performance of the said agreement; (2) that the defendants might be ordered to execute to the plaintiffs conveyances of the several properties specified in the schedule, and to hand over the title-deeds; and (3) for accounts, &c., &c.

On the 13th September, 1878, the case came on for hearing. The defendants did not appear, and an *ex-parte* decree was passed for the plaintiffs. The following is the material part of the decree :—

"This Court doth pass judgment for the plaintiffs, and doth declare that the *plaintiffs are entitled to have the agreement of the 27th September, 1871, specifically performed*, and this Court doth order and decree that the title-deeds and the several properties mentioned in schedule A to the said agreement be lodged in the office of the commissioner for taking accounts, &c., of this Honourable Court, to enable the plaintiffs to prepare the conveyance of the said properties. And this Court doth further order that proper deeds for carrying out the provisions of clause 9 of the said agreement be prepared by the several parties to whom the said properties are agreed to be conveyed at their own expense, and that such deeds when prepared be executed by the proper authorities. And this Court doth further order that the plaintiffs do pay to the defendants the sum of Rs. 3,300 on or before the execution of the said conveyances. And this Court doth further order that it be referred to Charles Edward Fox, Esq., as Commissioner appointed for that purpose, in pursuance of Act VIII of 1859,

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section 181, to take the accounts of the rents of the several properties and outstandings due to Tájoobhoy Kálábhoy, deceased, received by them or come to their hands respectively prior to the said 27th day of September, 1871, and the said Commissioner is to ascertain and report to this Honourable Court, with all convenient despatch, upon the matters hereby referred, after making all just allowances; and for the better taking of such accounts it is ordered that the plaintiffs and defendants do produce before the said Commissioner all books, papers, and documents in their or any or either of their custody, possession or power relating thereto."

The decree then ordered that the case should be referred to the Commissioner to take accounts of rents, &c., and concluded in the usual form, *viz.*, "any of the said parties are to be at liberty to apply to the Court as there may be occasion." The decree was sealed on the 9th October, 1878.

The case having thus been referred to the Commissioner's office, no steps were taken by the parties for six years, *viz.*, until September, 1884, when the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties included in schedule A of the agreement, which, as above stated, were to go to the plaintiffs as their share. The defendants at once applied that the plaintiffs on their part should be directed to lodge the title-deeds of the properties in schedule B which were to be conveyed to them, but the Commissioner refused to make this order, being of opinion that he was not authorised to do so under the decree, which contained no directions to him in respect thereof. The defendants thereupon, on the 10th November, 1884, gave notice to the plaintiffs, that they would make an application to the Court "to set aside or vary its order of the 13th September, 1878," in certain specified particulars. The terms of the notice of motion are set out in full in the order made by the Court upon the motion. *(See infra.)*

This motion was not brought on until September, 1885, and on the 10th September, 1885, it was dismissed with costs; the learned Judge (Bayley, J.,) being of opinion that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882), and further that the application was barred by limitation under

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article 164 of the Limitation Act XV of 1877 The order dismissing the motion was drawn up, and was as follows —

"Upon hearing Mr Macpherson, advocate for the defendants, who on the 2nd February, 1885, moved, on notice of motion dated 10th November, 1884, for the following orders and directions of the Court, namely —

"1 To set aside or vary the order of the Court made in this suit on the 13th September, 1878, so far as it relates to the lodging in the office of the Commissioner or handing over the title deeds, and executing the conveyances as mentioned in the said order

"2 To appoint a receiver to collect and get in the rents, profits, and income of the immoveable property situate at Butcher Street, and more particularly described in schedule C to the agreement of 27th September, 1871

"3 To order the plaintiffs, or any or either of them, to deliver up possession forthwith to the defendants of the immoveable property situate at Máhim, and more particularly lastly described in the schedule B to the said agreement of 27th September, 1871

"4 That the Commissioner of the Honourable Court be directed to take from the plaintiffs, or either of them, the following accounts namely —(i) an account of the rents and profits of the aforesaid property at Máhim received by the plaintiffs, or either of them, from the time of their or either of their taking forcible possession as stated in paragraph 14 of the defendants' affidavit affirmed on the 5th November, 1884, up to the time of delivering possession thereof to the defendants, (ii) an account of the rents and profits of the aforesaid property at Butcher Street received by the said plaintiffs, or either of them, from the passing of the decree mentioned in paragraph 17 of the foregoing affidavit up to the time of delivering possession thereof to the receiver aforesaid; and (iii) an account of the building materials which the plaintiffs, or either of them, appropriated to their, his, or her own use, as mentioned in the said paragraph 17 of the said affidavit; and upon reading, &c, &c, and the motion being this day called on for judgment, it is ordered that the motion be refused, and that the defendants do pay to the plaintiffs their costs of, and incidental to, the said motion"

On the 28th April, 1887, the defendants through their attorneys sent the following notice of motion to the plaintiffs —

"Take notice that on Thursday next, the 5th day of May, 1887 or so soon thereafter as he can conveniently be heard, counsel will move on behalf of the defendants abovenamed, before the Honourable Mr Justice Bayley, on the grounds of the joint affidavit of the defendants abovenamed, (copy whereof is sent herewith), for an order and direction of the Court that the plaintiffs do perform their part of the agreement of the 27th September, 1871, referred to in the said plaint so far as it remains unperformed by them, by forthwith giving up possession to the defendants of the Máhim property referred to in the defendants' said affidavit, and by rendering an account of the rents, produce, and profits thereof, and after ascertaining the amount of such rents, produce and profits by paying the same to the defendants, and that a division or sale of the property described in

schedule C to the said agreement and situate in Butcher Street, Bombay, be made, and that the plaintiffs, or one of them, do account for the rents and profits of the said property; and that the defendants receive their shares upon such division or sale and also their shares in the rents and profits thereof, and take further notice that at the time of making such motion as aforesaid the defendants will rely upon their affidavits affirmed respectively on the 5th November, 1884, 1st December, 1884, and 18th June, 1885, and the affidavits of Herbert William Bucklan l affirmed on the 15th December, 1884, and the 18th June, 1885, and filed in support of and the affidavit of the first plaintiff affirmed on the 25th November, 1884, filed in opposition to the motion made on their behalf before the Honourable Mr Justice Bayley and dismissed by His Lordship on the 10th September, 1885 Dated this 28th April, 1887."

The motion having come before Bayley, J., he referred it to the Chief Justice as a proper case to be heard by two Judges, and it accordingly came on for hearing before Sargent, C.J., and Bayley, J.

Macpherson, (Acting Advocate General), for the defendants, in support of the motion —The plaintiffs obtained, *ex parte*, a decree against the defendants for specific performance of the agreement of September, 1871. In order that the decree may be carried out, the matter has been referred to the Commissioner; but as the decree stands, the Commissioner is authorized only to enforce the agreement against the defendants, and not against the plaintiffs. Under the agreement, all the properties mentioned in schedule B are to go to the defendants as their share, and the property mentioned in schedule C is to be sold, and the proceeds divided. But the plaintiffs still keep possession of one of the properties, (called the "Máhím property"), mentioned in schedule B and also the property in schedule C. The decree ordered nothing on behalf of the defendants, but gave specific performance to the plaintiffs, and the result is that the Commissioner considers that he cannot enforce it in our favour against the plaintiffs. But the Court in giving judgment must have intended the whole agreement to be performed.

[SARGENT, C. J.—You ask for a rectification of the decree. But there is no doubt that the decree meant to give specific performance to the plaintiffs, on the condition of their performing their part of the agreement Upon a decree for specific per-

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formance both sides can go into chambers, and obtain all that is necessary to carry out the agreement.]

That is all we ask. We ask either that the Court should now declare that that is what is meant by a decree for specific performance, or that it should now insert in the decree the directions that are necessary in justice to the defendants. The agreement and decree have been carried out, except that some of the property, which ought to come to the defendants, is still withheld by the plaintiff. We now ask the Court to order him to carry out his part of the agreement, for the specific performance of which he got a decree. We have demanded possession of our property, but he has not given it. The decree might be in these words: "declare that the said agreement ought to be specifically performed, and this Court doth order that it be specifically performed by plaintiffs and defendants respectively." We also ask that the plaintiffs should be directed to account for the rents and profits of the Máhim property. The Court can alter the decree—Daniell's Chancery Practice (last ed.), pp. 813-823; *In re Swire*[1]. Section 206 of Civil Procedure Code (Act XIV of 1882) does not apply to the High Court. This Court has its powers independently of the Code. Counsel also referred to *Lawrie* v. *Lees*[2] and Seton on Decrees, 1284.

Jardine for plaintiffs, *contra*:—I appear for the plaintiffs to resist the motion, of which we got notice by the letter of the 28th April, 1887. In that letter there is nothing said about any intention to apply for a rectification of the decree, and I, therefore, do not propose to argue that point.

[SARGENT, C. J.:—But this question of rectification has been now argued at length before us. If the point does not arise out of the notice served upon you, the objection ought to have been taken at once, so that the discussion before the Court might be limited to the points raised in the notice. Such an objection ought to be taken as a preliminary point. As it was not taken, we must hold that the form of the motion as made to the Court was acquiesced in, and the motion must now proceed on that basis.]

(1) 30 Ch. Div., 239. (2) 7 App. Cas. 19, at p. 34, 35.

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Then I submit that the Court has no materials before it to enable it to deal with the question of rectification of the decree. The decree is now ten years old. The defendants have had, in some respects at all events, the benefit of that decree, and now at the end of ten years they ask that it may be rectified. If they were dissatisfied with the decree, they might have had it set aside, or have got a review. They did not avail themselves of either of these remedies. How can they complain now?

But, further, I submit that this question is *res judicata*. On the 10th November, 1884, the defendants gave notice of motion "to vary the decree",—that is, to rectify it. They did not bring on that motion until the following year, and on the 10th September, 1885, it was dismissed with costs. The defendants asked then for precisely the same relief that they ask now, but in a different way. They might have urged then all that they urge now. They were bound to bring forward every ground on which they could ask relief—sec. 13 of the Civil Procedure Code (Act XIV of 1882). They use the same affidavits now that they used then. Their application was refused.

[SARGENT, C. J.:—That application appears to have been refused on the ground that, unless the decree was set aside, nothing could be done. The alteration they then asked for was ancillary to setting aside the decree. They asked that the decree should be varied in case it was first set aside, and the Judge thought that sufficient cause was not shown justifying the setting aside of the decree under section 108 of the Code. The application now is to amend the decree by inserting certain words.]

The relief asked for is the same. The order recites the whole application, and refuses it. The Court can only look at the order to see what was asked for and what was done, and that order shows that the present application is *res judicata*.

Further, is no lapse of time to be a bar to an application of this kind? This is really an application for review, but a review is barred. Will the Court, on an application of this kind, do what it would refuse to do on an application for review?—*Assur Ali* v. *Woolfutoonissa*[1].

(1) 13 Calc. W. R., 33.

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[BAYLEY, J.:—This application is not made under the Code, but under the general powers of the Court.]

Where a special remedy is given by law, parties cannot seek similar relief under the general powers of the Court.

Macpherson in reply:—This is not an application for review under section 623 of the Code. That section gives the right to apply for a review of judgment. The word "judgment" is defined by section 2 of the Code. In a review you attack the judgment. We do not complain, in any way, of the judgment. We ask rather that the decree may be made to conform to the judgment.

SARGENT, C.J.:—The question before us arises on the notice of motion given by the defendants to the plaintiffs on the 28th April. (His Lordship read the notice above set forth.) The motion having come before Bayley, J., he has referred it to this Court for decision.

The whole matter has been referred to us, and there is no doubt, therefore, that the plaintiff might have taken here any objection which he might have taken before. If, when the case first came on before Mr. Justice Bayley, it had been objected that the defendants, on the notice which they had given, could not ask for a rectification of the decree, and that objection had been repeated here, I should have been disposed to refuse this application on that ground.

In this case, however, the objection, that the notice of motion did not state that an application would be made to rectify the decree, was not made until Mr. Macpherson had concluded his argument, and was then too late. The question, therefore, now is, whether the order asked for can be made, having regard to the terms of the decree; and, if not, whether the decree can now be rectified so as to allow the order to be made.

Under the terms of this decree I should not myself have had any difficulty in making all the orders necessary against both parties for its performance. The declaration which the decree contains, that the plaintiffs are entitled to have the agreement of the 27th September, 1871, specifically performed, implies that he is himself specifically to perform it, as well as the defendant.

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As, however, the absence of mandatory words as against the plaintiffs has given rise to difficulties, we have now to consider whether the decree can now be rectified so as to allow the necessary orders to be made. Can we now insert the mandatory words? We have been referred to *In re Swire*(1). In that case Lindley, L.J., says: "There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed as entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right.....It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not." And Bowen, L. J., says: "Every Court has inherent power over its own records as long as those records are within its power, and it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister. An order, as it seems to me, even when passed and entered may be amended by the Court so as to carry out the intention and express the meaning of the Court at the time when the order was made, provided the amendment be made without injustice, or on terms which preclude injustice."

These passages, which I have read from the judgments of the Lords Justices, must commend themselves to the common sense of every one.

It is true that a considerable time has elapsed since the decree was made. The decree was passed in 1878, and we are now in 1887. What is it, however, that we are really asked to do? We are merely asked to put the decree into the ordinary and usual form of decrees in cases of this nature. I can see no difficulty in doing this. The plaintiffs asked for a decree for specific performance of an agreement, and they got it. How can they object to the decree being in the form in which such decrees are ordinarily framed? The decree, as it stands at present, declares

(1) L. R., 30 Ch. Div., 239, at pp. 246 and 247.

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that "the plaintiffs are entitled to specific performance of the agreement." The usual form is to declare that "the agreement ought to be specifically performed, and the Court doth order and decree that the same be specifically performed accordingly." I think the decree may be amended so as to put it into the usual form.

But we have been asked by the defendants to do more than this. We have been asked to add further and consequential directions. We think, however, that we cannot do this. Many things may have happened to affect the position of the parties, and we are of opinion that it would not be safe to do more than we have said. Under the decree as amended, the parties can, no doubt, have the agreement carried into effect.

It has been contended that the present motion is *res judicata*; and that the question was decided by Mr. Justice Bayley by his order of the 10th September, 1885. No doubt, reading literally the notice of motion on which that order was made, the relief there asked for would seem to be the same as that applied for now. But it is impossible not to see how the Judge there dealt with the motion. The first clause of the notice of motion, as stated in the order itself, was that the defendants would apply to set aside the decree of the 13th September, 1878. That was an application under section 108 of the Code. The notice of motion, however, included other points, and no doubt these points included the matters in respect of which the defendants now seek relief. It is clear, however, that Mr. Justice Bayley dealt with these subsequent points as ancillary to the first and main point raised in that motion, *viz.*, the defendant's right to set aside the decree. Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and, therefore, I do not think that the present application is *res judicata* by reason of the order of the 10th September, 1885.

Then it was argued that the defendants might have applied for a review, and that having failed to apply within the prescribed time they are now barred from obtaining relief. We do not, however, think that this is a matter for review. It is the decree we are asked to alter, and not the judgment. There cannot be a

review because of an error in a decree. Section 206 of the Code deals with amendments of decrees; section 623, with review of judgments. The former section, however, does not apply to this Court.

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For the reasons which I have given, we are of opinion that the decree may be amended in the manner which I have pointed out. Inasmuch as the difficulties have plainly arisen in consequence of the defendants not having appeared at the hearing of the case in September, 1878, we think they ought to pay the costs of this motion.

Attorney for the plaintiffs:—Mr. *Khanderáv Moroji.*

Attorneys for the defendants:—Messrs. *Crawford and Buckland.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

KARSANDÁS NÁTHÁ AND OTHERS, (PLAINTIFFS), v. LA'DKA'VAHU, KARAMSI MÁDHOWJI, (A MINOR), AND KESSARBÁI, (DEFENDANTS.)*

1887. *September* 29, *October* 1.

Hindu law—Will—Adoption—Adoption directed to be made, not by testator's widow, but by the widow of his deceased son—Such adoption is an adoption, not to testator himself, but to his deceased son—Adoption of testator's nephew directed by will—Bequest of property to such nephew—Adoption a condition precedent to his taking the property under the will—Persona designata—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.

K., a Hindu, by his will dated the day before his death, declared that it was his wish to adopt his nephew Karamsi as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law Ládkávahu, (the widow of his deceased son Liládhar), was "to take the said Karamsi in adoption." This will then continued: "His adoption ceremony is to be performed. My property, which may remain as a residue after all the things mentioned in my will have been done, I give to this lad as his inheritance, and I appoint him as my heir." A subsequent clause of the will directed as follows:—

46. "In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said Karamsi shall have been adopted, should he die without (leaving) any descendants, then *Chora* Ládkávahu is duly to adopt, out of my father Jádu Asar's descendants, any lad who may be found fit. And if the said Ládkávahu should not be living at that time, then

* Suit No. 185 of 1887.

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(any) lad (begotten) of the loins of my father Jádu Asar who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property, as mentioned above, is duly to be given in inheritance. And his adoption ceremony is to be performed. And the outlays on the occasion of his marriage also are duly to be made as written above."

Held, that the direction by the testator to his daughter-in-law to adopt a son was a direction to her to adopt a son to herself and her deceased husband Liládhar, and not to adopt a son to the testator; the former being the only adoption which she was by Hindu law competent to perform.

Held, also, that, unless Karamsi was adopted as directed by the will, he was not entitled to the testator's property. His adoption was a condition precedent to his inheritance.

The will also contained the following devise in favour of the testator's grand-daughter Kessarbái, who was unmarried at the date of K 's death —

27 "When Kessarbái may marry, there is to be given to her out of my immoveable property one house which has been purchased from Sháh Virji Narsi's widow Liládái. * * * That (house) is to be given to *Chora* Kessarbái as *Lanyáddn*. The rent which it may yield, Kessarbái may enjoy after (she) my grand daughter shall have married. And after Kessarbai's decease (the ownership of) the said house shall duly be enjoyed by Kessarbái's children. If by the will of God Kessarbái should die without (leaving) descendants, then my 'Trustees' are duly to take back the said house into their possession."

Held, that, under the above clause, Kessarbái was entitled only to a life estate in the house.

THIS suit was brought by the plaintiffs, as executors of the will of Kessowji Jádowji, for the purpose of having the will of their testator construed.

Kessowji Jádowji, a Hindu inhabitant of Bombay, died on the 9th February, 1886, leaving a will, dated the 8th February, 1886, of which he appointed the plaintiffs to be the executors. Probate of the will was obtained on the 7th March, 1886. The testator left him surviving (1) his daughter-in-law, the first defendant Ládkávahu, who was the widow of his deceased son Liládhar Kessowji, (2) a grand-daughter Kessarbái, the only child of Ládkávahu, and (3) Karsandás Náthá, the first plaintiff, who was the son of a separated brother of the testator.

The testator left a very large amount of property, both moveable and immoveable. By his will he bequeathed many legacies and a large sum in charity. He also provided for his daughter-in-law, the first defendant Ládkávahu, and his grand-daughter

Kessarbái. He then directed (clause 28) that his daughter-in-law should adopt one Karamsi Mádhowji, the son of his nephew Mádhowji Kachrá; and the residue of his property, "after all the things mentioned in his will had been done," he gave "to this lad as his inheritance".

The following are the clauses of the will which are material to this report:—

10. "In our caste at Abdásha a distribution *(lani)* of small silver goblets is to be made. To each house (family) one small goblet (weighing) about eleven *tolás* is to be given."

20. "As to whatever ornaments (or jewellery) and silver and copper (and) brass vessels (and vessels) of other metals which there are in my house, and as to the household furniture of any sort whatever that exists, all those (I) give to my son Liládhar's widow Ládkávahu. She may use the same according as she may please."

21. "In Mody Bazár there is my house (known as) that of Sháh Lálji Punsi. It has now fallen down. That house is to be (re)built and completed with three upper storeys, (outlays being made) out of my property. The said Ládkávahu is to reside therein. And my (deity) *Thákorji* shall gloriously abide in the said house. A *bhot* (arrangement, &c.,) is to be made in respect of the temple thereof. And my executors are to purchase out of my property and give to Ládkávahu household furniture for the said house (worth) Rs. 2,500. My place of business *(pedi)* is to be established in the hall on the first storey of the said house. And the remaining portion of the house the said Ládkávahu may duly use as she may think (proper)."

24. "*Choru*[1] Liládhar's daughter Bái Kessarbái is now (living). When Ládkávahu shall get her betrothed, in accordance with the advice of *Choru* Karsandás, an executor of my (will), my trustees are to pay to her out of the undermentioned 'trust fund' Rs. 1,000 for the expenses of her betrothal."

25. "When my grand-daughter Kessarbái may marry, on the occasion of her marriage for (the purpose of) defraying) the ex-

(1) *Choru*, which is equivalent to child, is a term applied to the junior members of a family by the seniors.

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penses of inviting and feasting the caste and the expenses of feasting the *ján*[1] (brought) by the *vevái*[2] and the expenses of (giving) *peharámni* (presents) the said Ládkávahu shall duly spend, in accordance with the advice of my executors from Rs. 8,000 to Rs. 11,000 out of my property. Those rupees are to be paid out of the income of the 'trust fund'."

26. "When Kessarbái may marry, gold, silver and jewelled ornaments and wearing apparel worth from Rs. 14,000 to Rs. 15,000 are duly to be given to Kessarbái out of my property at the time of the '*kanyádán*' (ceremony). The amounts mentioned in the foregoing twenty-fifth and twenty-sixth clauses (directed to be paid) for the marriage, my 'trustees' are duly to pay out of the undermentioned 'trust fund'."

27. "When Kessarbái may marry, there is to be given to her, out of my immoveable property, one house which has been purchased from Sháh Virji Narsi's widow Lilábái. The said house bears 'Ward No.' 1451 and 'Street Nos.' 225 and 231 in the municipal bill, and (it) is (situated) in Kázi Sái (D) Street. That (house) is to be given to *Choru* Kessarbái as *kanyádán*. The rent which it may yield, Kessarbái may enjoy after (she) my granddaughter shall have married. And after Kessarbái's decease (the ownership of) the said house shall duly be enjoyed by Kessarbái's children. If, by the will of God, Kessarbái should die without (leaving) descendants, then my 'trustees' are duly to take back the said house into their possession."

28. "There is my nephew Mádhowji Kachrá's son Karamsi Madhowji, now (living). He is about nine years of age. It is my wish to adopt him as my son. If I should not be able to do so in my lifetime, then my son Liládhar's widow is to take the said Karamsi in adoption. His adoption ceremony *(dattavidhán)* is to be performed. My property which may remain as a residue, after all the things mentioned in my will have been done, I give to this lad as (his) inheritance. And (I) appoint

(1) *Ján* means party of relations, &c., which accompanies the bridegroom when he goes to his father-in-law's house to be married there.

(2) *Vevai* is the father-in-law of one's son or daughter.

(him) as my heir. *Chorn* Liládhar's widow Ládkávahu is to get him betrothed (the outlays being made) out of my property. For the same about Rs. 5,000 are to be spent."

29. "After Bhái Karamsi Mádhowji shall have been taken in adoption, Karamsi is to use (as his) name (the name) Karamsi Kessowji. And when Karamsi may marry, an outlay of Rs. 6,000 for (giving) feasts, &c., at his marriage is to be made out of my property. And for Karamsi's wife, ornaments (or jewellery) to the amount of Rs. 7,500 are to be made out of my property. The expenses referred to in the twenty-eighth and twenty-ninth clauses my 'trustees' are to pay out of the income of the undermentioned 'trust fund.'"

30. "*Chorn* Karamsi Mádhowji is to reside with Ládkávahu. After (he) shall have attained the age of eighteen years if (he) cannot agree with Ládkávahu, then Karamsi is to reside on the first storey of the house (known as) that of Sháh Lálji Punsi; and on the second and third storeys (thereof) Ládkávahu is to reside. And when Karamsi shall (go to) live apart, my executors are to fix and give him a (certain) sum every month for his expenses as to them may appear proper and just. The same is to be paid out of the income of the undermentioned 'trust fund.'"

31. "On *Chorn* Karamsi attaining the age of twenty-one years, if his conduct should be good, my executors are duly to make over to him my property. And if Karamsi's conduct after he has come of age should not be good—that is to say, if he should turn out to be a drunkard or a profligate (person)—then my property is not to be made over to him at that time. When (in case) his son born (to him) shall be (should be a person) of good behaviour, the same is to be made over to him. But if Karamsi should be (a person) of good behaviour, then my executors are not in any way to obstruct him."

35. "After the said Kessarbái's marriage when her *agarnú*(1) (ceremony) take may place (the presents called) *mosalu* on account thereof will have to be made. For that purpose my 'trustees'

(1) *Agarni* is the ceremony performed on the occasion of the first pregnancy of a Hindu wife.

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are duly to pay out of my property Rs. 2,000 out of the income of the undermentioned 'trust fund.'"

40. "My immoveable property is here. It is my intention to make a 'trust' thereof. And, if I should not have made that 'trust' in my lifetime, the executors of my 'will' are to make a 'trust'. In that trust I give and settle to give my immoveable property mentioned below. The said properties are (situated) in different localities. The municipal authorities have fixed (the different) 'wards' to which they belong. The numbers thereof they have mentioned in their bills. The said numbers and the street numbers and the names of the streets as mentioned in the municipal bills, (I) state below (*i. e.*) those of each one property."

41. "When my own (grand-daughter) Kesarbái shall marry, Rs. 15,000 are to be paid to her as a 'legacy' out of my property. And for that (amount) 'Government promissory notes' are to be purchased and given; or (some) immoveable property is to be purchased and given. The income of the interest (and) rent thereof that shall be received is duly to be paid to Bái Kesar."

46. "In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said Karamsi shall have been adopted, should he die without (leaving) any descendants, then *Chotu* Ládkávahu is duly to adopt, out of my father Jádu Asar's descendants, any lad who may be found fit. And if the said Ládkávahu should not be living at that time, then (any) lad (begotten) of the loins of my father Jádu Asar, who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property, as mentioned above, is duly to be given in inheritance. And his adoption ceremony is to be performed. And the outlays on the occasion of his marriage also are duly to be made, as written above."

This suit was filed by the executors in April, 1887. The plaint stated as follows:—

"2. Various questions have arisen as to the validity of certain of the bequests contained in the said will and as to the true construction of some of the provisions of the said will, and the

plaintiffs have been advised that they ought to submit the said questions to the judgment and direction of this Honourable Court.

"3. The said questions may be shortly stated as follows:—

"(*a*) Whether any, and if so which, of the bequests and directions in the said will contained are invalid, and if so to what extent are the same invalid?

"(*b*) What are the rights and interest of the defendant Ládkávahu in the testator's estate under his said will?

"(*c*) What are the rights and interest of the defendant Karamsi Mádhowji in the testator's estate under his said will?"

The prayer of the plaint was as follows:—

"(*a*) That it may be declared by this Honourable Court whether any, and if so which, of the bequests and direction contained in the said will are invalid, and if so, to what extent they are invalid?

"(*b*) That the right and interest of the defendant Ládkávahu in the said testator's estate under his said will may be ascertained and declared by this Honourable Court.

"(*c*) That the right and interest of the defendant Karamsi Mádhowji in the said testator's estate under his said will may be ascertained and declared by this Honourable Court.

"(*d*) That, if necessary, the said estate may be administered by, and under, this Honourable Court's direction."

The first defendant Ládkávahu filed a written statement in which she asked that the Court should direct the punctual payment to her of the various sums to which she was entitled under the testator's will. She also complained that the plaintiffs had not handed over to her the silver vessels and ornaments and furniture given to her, as directed by the 20th clause of the will; and that they had not carried out the directions of clause 21. The concluding clauses of her written statement were as follows:—

"5. This defendant submits to the judgment of this Honourable Court the true construction of the clause 28 of the said will, and how far the directions in the said clause and clause 29 contained are valid, and how the same ought to be carried into effect. This

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defendant says that the testator shortly before his death promised this defendant that she should receive a sum of Rs. five lákhs out of his estate if she adopted Karamsi Mádhowji; and this defendant submits that this sum should be ordered to be paid to her if the said adoption is performed. This defendant believes that Mádhowji Kachrá, the father of the said Karamsi Mádhowji, is not willing to give his said son in adoption, unless he is paid a large sum of money out of the said estate, and this defendant submits to the judgment of this Honourable Court whether such sum should be paid to him.

"6. This defendant also submits that the various sums described by this will to be paid to, or for the benefit of, the said Kessarbái should be forthwith set aside.

"7. This defendant also submits that the religious charitable bequests in the said will contained should be forthwith carried into effect."

The second defendant, Karsandás Mádhowji, in his written statement claimed to be absolutely entitled to the residuary estate of the testator under his will; and that an adequate sum should be set aside and applied for his maintenance and education.

The suit came on for hearing before Farran, J., on the 29th September, 1887, when the following issues were raised:—

1. Whether the Advocate General is a necessary party to the suit?

2. Whether Kessarbái, the daughter of Ládkávahu, is a necessary party to the suit?

3. Whether the defendant Ládkávahu is absolutely entitled to the copper, brass, and other vessels and furniture left by the testator, and referred to in clause 20 of the will?

4. Whether the house at Mody Bázár, mentioned in clause 21 of the will when rebuilt and completed, is to be included in the trust provided by clause 40 of the said will?

5. What is the true construction of clauses 28, 29, and 30 of the will?

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6. Whether any of the sums directed to be paid to, or for the benefit of, Kessarbái should not be forthwith set aside for her benefit?

7. What estate Kessarbái takes in the house given to her by clause 27 of the will?

8. How far the religious and charitable bequests in the will should be carried into effect?

9. Whether the second defendant Karamsi Mádhowji is absolutely entitled to the whole, or what part, of the residuary or other estate of the testator comprised in the said wills?

10. Whether the second defendant is entitled to any, and what, sum for his maintenance and education?

Counsel for the various parties having stated that it was not intended to challenge any of the charitable bequests in the will, the Court found, on the first issue, that the Advocate General was not a necessary party to the suit. As to the second issue, the Court was of opinion that Kessarbái was entitled to appear, and directed that she should be added as a co-defendant, and the first defendant was appointed as her guardian *ad litem*.

Macpherson, (Acting Advocate General), and *Chitty* for the plaintiffs.

Jardine and *Telang* for the first defendant.

Lang and *Russell* for the second defendant Karamsi.

Telang and *Carnac* for the third defendant Kessarbái.

Macpherson for the plaintiffs:—The first and eighth issues are immaterial, as none of the parties propose to contest the charitable bequests in the will. The second issue has been disposed of, as Kessarbái has been made a party to this suit. As to the third issue, I refer to clauses 10 and 20 of the will We do not offer any evidence, and leave the construction of these clauses to the Court.

As to the fourth issue. This issue depends on the construction of clauses 21 and 40 of the will. We submit that Ládkávahu is only given the use of the house in question Under the last paragraph of clause 21 she would probably be entitled to let the house. Clause 30 also applies to this house.

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As to issue No. 5. With regard to clauses 28, 29, and 30 of the will, the executors submit whether the direction given to his daughter-in-law to adop Karamsi is not wholly inoperative. We say Karamsi cannot now be adopted. A man cannot delegate the duty of adopting to any one but his widow—West and Bühler, p. 1072, p. 984; *Bhagvándás Tejmal* v. *Rájmal*(1). The testator clearly intended that his daughter-in-law should adopt to himself: see clause 46. But it has never been decided that any one can thus act vicariously for a man, except his own widow.

Further, the executors submit that the gift of the residue to Karamsi is conditional on his being adopted. This question depends on the construction of the will. The cases on this point are only useful as illustrations. In *Nidhoomoni Debya* v. *Sarada Pershad*(2) the Privy Council held that where a gift was made to a person whose adoption was contemplated by the testator, such person took as a designated person, whether adopted or not. But see the decision of Sargent, J., in *Shámávahoo* v. *Dwárkádás Vasanji*(3); *Funindra Deb Raikat* v. *Rajeswar Dás*(4); *Doorgá Sundari Dossee* v. *Surendra Keshav Rái*(5). The will in *Shámávahoo's Case*(6) was similar to this will, and the reasoning in the judgment applies here. We contend that the gift to Karamsi is contingent on his adoption.

As to issues nine and ten. These issues naturally come next in order, for they depend on the decision of the fifth issue. If our contention be correct, *viz.*, that Karamsi cannot be adopted, then these issues are immaterial. But if we are wrong, and if Karamsi may be adopted by Ládkávahu, then it is necessary to decide these issues. The questions raised depend on clauses 30, 31, and 46 of the will. We contend that Karamsi, at most, takes a life estate under these clauses. Karamsi is now only nine years of age, and there is no provision for his maintenance until he is eighteen.

As to issue No. 6. This issue depends on clauses 24, 25, 26, 27, 35, and 41. We say the sums referred to in this issue ought not

(1) 10 Bom. H. C. Rep., 241, at p. 257.
(2) L. R., 3 Ind. App., 253.
(3) See *infra*, p. 202.
(4) L. R., 12 Ind. App., 72; S. C. I. L. R., 11 Calc., 463.
(5) I. L. R., 12 Calc., 686, at p. 693.
(6) *Infra*, p. 202.

to be set aside, as these clauses provide that the legacies are to be paid out of the trust fund.

As to issue No. 7. We say under clause 27 Kessarbái takes a life estate. The gift to her children is void, as she has no children at present—*Tágore's Case*[1].

Jardine for the first defendant Ládkávahu:—Issue No. 3 is the first issue in which we are interested. As no evidence is offered by the other parties, it must be decided in our favour.

As to issue No. 4 We agree with the plaintiffs that the house referred to is comprised in the trust, but subject to the directions in clauses 21 and 30 of the will. We say Ládkávahu takes a life interest in the house, subject to the specific appropriation of it, either present or contingent, contained in clauses 21 and 30, and that she is entitled to such portion of it as is not appropriated.

As to issue No. 5. We contend that the clauses referred to in this issue contain a direction to Ládkávahu to adopt Karamsi as son to herself and her deceased husband, Liládhar, and that Karamsi's inheritance is conditional on such adoption. see clause 28. The religious efficacy of a grandson is the same as that of a son.

The direction that Karamsi should take the name of Karamsi Kessowji would be mere surplusage if he were adopted to the testator. The Court should adopt a construction which would give effect to the intention of the testator. The words of the will in *Shámávahoo's Case*[2] were stronger than the words here: see clause 15 of the will in that case.

We also contend that the gift to Karamsi is contingent on his adoption. *Shámávahoo's Case*[2] is directly in point. Clause 46 of the will is almost conclusive. The provision in this clause as to the possible adoption of some other person is nugatory, unless the gift under clause 28 is conditional on adoption The words in this latter clause giving Karamsi the residue follow the words directing his adoption The will in *Shámávahoo's Case*[2] is different in this respect.

(1) L. R., Ind App Sup Vol., 47 (2) *Infra*, p. 202.

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Telang for Kessarbái:—As to issue No. 7. Only for the latter part of clause 27 Kessarbái would undoubtedly take an absolute interest. We ask the Court to construe the clause as a gift to Kessarbái and her children. It is a gift to her on her marriage, subject only to its being divested on her death without issue.

Lang for the second defendant Karamsi Mádhowji:—We submit that Karamsi is absolutely entitled under the will, although he has not been adopted and although he should never be adopted. Ládkávahu may refuse to adopt him, and she cannot be compelled to adopt. It is impossible that the testator can have intended the devolution of his property to depend entirely on the will of Ládkávahu. This must be the result if the Court holds adoption to be a condition precedent to Karamsi's taking the property. The Court, if possible, will hold this to be a condition subsequent, not a condition precedent—Theobald on Wills, (3rd ed.), p. 373.

[FARRAN, J.:—Has that principle ever been applied by the Privy Council to Hindu wills?]

I do not know of any case. It is only by holding that adoption is one of "the things mentioned to be done" in clause 28 that it can be made a condition precedent. But it is clear that those words refer to the residue remaining after making the prescribed payments. If adoption be a condition precedent, the estate may be in suspense indefinitely, for Ládkávahu can adopt at any time till her death, and until then the estate will not vest—*Peyton* v. *Bury*(1). A condition precedent must be expressly stated, and cannot be implied. Here it is only implied. If the plaintiffs' contention be correct, the Court must imply an impossible condition precedent. If Ládkávahu's argument be correct, the estate is left at her mercy. Clause 31 shows that Karamsi is the *persona designata*, and not any adopted son. *Shámráhoo's Case*(2) is distinguishable in several points; but in any case that decision is not binding on this Court. The words of the will there were different. Clause 46 of this will shows that the testator selected Karamsi to be his heir, and expressed a desire that he

(1) 2 P. Williams, 625. (2) *Infra*., p. 202.

should be adopted. *Nidhomoni Delya* v. *Saroda Pershad*(1) is a very ambiguous case, and is in our favour.

If, however, the Court holds adoption to be a condition precedent, then we submit that the contention made on behalf of Ládkávahu is correct, and not that made on behalf of the plaintiffs. The Court will not hold that the contention is to do what by Hindu law cannot be done.

[FARRAN, J.:—What do you say is to be the effect of clause 27? You are interested if you take the residue.]

I say Kessarbái takes a life interest only.

Macpherson in reply:—As to clause 27, the contention that the words "and after Kessarbái's decease, &c." are words of limitation cannot be supported. The fact that the gift to her children is void, does not give her a larger interest; therefore she takes only a life interest. As to clauses 28 and 29, it is clear that the testator's object was to perpetuate his name by having an heir, and the natural way of doing that was to have adopted a son to himself. That was clearly his intention in making his will. But it is contended that he must have known that by Hindu law an adoption to himself by his daughter-in-law was impossible. It is clear, however, that the testator did not know the law as to adoption. Clause 46 shows that he contemplated an adoption by his executors.

The English rules as to conditions precedent are not applicable here. It is a misnomer to call this a condition precedent. The question is, who is the devisee? Is the devisee the adopted son, or is it Karamsi whether adopted or not?

FARRAN, J.:—I do not think that any advantage would be gained by delaying my judgment in this case, and I will, therefore, give my decision at once. I will take the issues in their order.

The first I have already decided, and have held that the Advocate General is not a necessary party to this suit. The eighth issue may be taken in connection with the first. All parties are willing that the charities should be carried out; and as there is

(1) L. R., 3 Ind App., 253.

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nothing which is shown to be invalid in the charitable bequests in the will, I will find the eighth issue in the affirmative. The intention of the testator is clear, and as all parties are desirous that his intention should be effectuated, even though there may perhaps be some doubt as to its perfect legality, I will not endeavour to discover it.

The third issue also I decide in the affirmative, no evidence having been offered with regard to it.

Next comes the fourth issue. I decide this issue in accordance with the contention put forward on behalf of the plaintiffs and the first defendant; and I hold that the house in Mody Bázár is comprised in the trust created by clause 40 of the will, and ought to be included in it, but subject to the provisions contained in clauses 21 and 30.

Passing over the fifth, I deal with the sixth issue. All these sums are plainly to be paid out of the income of the trust premises, and that income cannot be ascertained at present. This issue must, therefore, be decided in the negative.

As to the seventh issue, I confess I should wish to put a different construction on the will than that which I find myself compelled to adopt. (His Lordship read clause 27 of the will.) It is true that a gift of the rents of a property is generally equivalent to a gift of the property itself; but it is clear that the testator does not mean or intend that Kesarbái shall take the property absolutely. He gives her the rent of the house, and after her death he gives "the ownership" to her children. Obviously, therefore, if she had children she was only to take a life estate. But at the testator's death Kesarbái had no children, and, therefore, on the authority of the *Tágore Case*[1], the gift to them is void. That circumstance, however, cannot be taken to enlarge the interest given to her by the will, and, therefore, I must find upon this issue that under clause 27 she is entitled only to a life estate.

The remaining issues to be dealt with, *viz.*, the fifth, ninth, and tenth, all depend on the construction to be put on clauses 28, 29, 30, and 46 of the will. By clause 28 the testator directs his

(1) L. R., Ind. App. Sup. Vol., 47.

daughter-in-law, (the first defendant Ládkávahu) to adopt a son (His Lordship read clause 28.) Now, the first question which arises is, whether that direction is a direction to her to adopt a son to himself (the testator), or a direction to her to adopt a son to herself and her deceased husband Liládhar, which was the only adoption which she was competent by Hindu law to perform. By that law any adoption made by a widow enures to herself and her husband. Why should I hold the testator to have directed Ládkávahu to do what she could not do? The fact that by clause 29 the adopted son is directed to take the name of Karamsi Kessowji has been relied on as showing that the adoption was intended to be to the testator. I do not think, however, that any weight can be attached to that circumstance. That direction would have been unnecessary if the adoption was to the testator, but I do not think it in any way assists us in construing clause 28. The provisions of clause 46, however, tend to show that what Ládkávahu was directed to do was what could be legally done, *viz.*, to adopt a son to her husband and herself. It was argued that the testator did not know the law, and in his ignorance contemplated an adoption to himself. But the Privy Council has laid down that in construing a Hindu will we are to keep in mind what the Hindu law is, and what it permits, and I must, therefore, hold that the direction to Ládkávahu was a direction to do what by law she was alone competent to do, *viz.*, to adopt a son to her husband and herself; and I find nothing in the will to compel me to hold otherwise.

The next question to be considered is, whether Karamsi is under the will entitled to the property, although he has not been adopted. I am unable to distinguish this case from the case of *Shamávahoo*[1]. I consider I should be bound by that authority even if I did not agree with it; and, if the decision be erroneous, I must leave the matter to the Appeal Court to be set right. But I do not disagree with that case; and I think, upon the facts, I should have come to the same conclusion.

In construing the will now before me I think clause 46 strongly supports the contention that inheritance was to be contingent on

(1) *Infra*, p. 202.

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adoption. The intention of the testator was that the adopted son, and no other, was to succeed to his property. He could not have intended that a person not adopted should inherit all his wealth, and leave penniless the son to be adopted for the purpose of perpetuating his family and name. If the will admits of the construction which will carry out what was clearly the intention of the testator that construction ought to be adopted. In the view of the testator, the direction as to adoption was the most important portion of his will, and I think that the adoption of a boy was one of "the things mentioned in my will" which by clause 28 were to be done before ascertaining the residue which was then to be given "to this lad as his inheritance." The words of clause 46 support that construction, for by this clause it is provided that the property is in certain events to go to a subsequently adopted son But that would be impossible if Karamsi took the property independently of his adoption and the adopted heir would be left wholly unprovided for. To my mind, that is almost conclusive as to the meaning of clause 28. In these clauses the testator, in effect, says, first "adopt a son", then "I give to the lad so adopted the residue of my property, and I appoint him my heir." By the word "heir" in this country is usually meant the person who can discharge the functions of an heir according to Hindu ideas. In the subsequent clauses of the will the boy so adopted is treated as the testator's heir.

My decision makes adoption a condition precedent to inheritance. The English decisions show, no doubt, that there is in England a strong desire to avoid, whenever it is possible to do so, any construction which would involve a condition precedent in such a case as the present. Here, however, we have to deal with Hindu law, and we must keep the provisions of that law in mind in endeavouring to carry out the intentions of a testator.

On the fifth issue, therefore, I find that Karamsi is entitled to the property on being adopted by Ládkávahu.

I admit that my decision on this point will leave the inheritance in suspense for a time, but that is always the case where a will directs an adoption to be made.

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As to the question raised by the ninth issue, probably, if adopted, Karamsi would take an absolute estate, but that question had better be left open for the present.

My decision on the fifth issue renders it unnecessary to record any finding on the tenth.

The decree will be a declaratory decree setting out the issues and the findings thereon, and declaring accordingly.

All parties to have their costs out of the estate, as between solicitor and client.

The following were the findings on the issues:—

3. That the defendant Ládkávahu is absolutely entitled to the copper, brass, and other vessels and household furniture left by the testator, and referred to in clause 20 of his will.

4. That the house at Mody Bazár, mentioned in clause 21 of the said will, when rebuilt and completed as provided in the said clause, is to be included in the trust provided for in clause 40 of the said will; and that Ládkávahu takes a life interest in the said house, but subject to the specific appropriation of it, present and contingent, contained in clauses 21 and 30; and that she is entitled to use such portions of it as are not so appropriated in such manner as she thinks fit.

5. That by clause 28 as read with clauses 29, 30, and 46 of the said will, Ládkávahu is directed to adopt Karamsi Mádhowji as her son, and that upon such adoption the said Karamsi will be entitled to the residue bequeathed to him by clause 28 of the said will to be made over to him upon his attaining the age of twenty-one years, in pursuance of the directions contained in clause 31 of the will. No finding as to the *quantum* of the estate taken by the said Karamsi in the said residue.

6. In the negative, and for the plaintiffs.

7. That Kessarbái takes an interest for life in the house given to her by clause 27 of the said will.

8. That the religious and charitable bequests contained in the said will are valid, and should be carried into effect.

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9. That until his adoption the defendant Karamsi Mádhowji is not entitled to the whole or any part of the residue or estate of the testator comprised in the said will.

10. No finding, as the defendant Karamsi Mádhowji has not yet been adopted.

11. Declaratory decree setting out the issues and the findings thereon, and declaring the rights of the parties in accordance with such findings.

All parties appearing to have their costs out of the estate taxed as between attorney and client. The infant's costs to be taxed separately from those of the defendant Ládkávahu in her personal capacity.

Attorneys for the plaintiffs :—Messrs. *Nánu and Hormasji*

Attorneys for the defendants :—Messrs. *Little, Smith, Freve, and Nicholson.*

Before Sir C. Sargent, Justice.

1888.
February 26.

SHA'MA'VAHOO, (PLAINTIFF), *v.* DWA'RKA'DÁS VASANJI AND OTHERS, (DEFENDANTS).*

Hindu law—Adoption—Adoption directed by will—Bequest of property by will to the boy named for adoption by testator—Adoption a condition precedent to such boy taking under the will—Conditional gift on adoption—Conditions proposed by natural father before consenting to give his son in adoption—Adopting widow not obliged to consent to such conditions.

G. T., a Hindu of the Bhátiá caste, died on the 6th September, 1887, having by his will, dated the same day, directed that, in case no son was born to him, his widow S., (the plaintiff), should adopt the son of his nephew, who was to be "made his adopted son". The following was the material part of the will :—

"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife Shámávahoo, then I direct and order and appoint as follows :—There is my nephew Bhái Dwárkádás Vasanji. He has now one son to whom he has not as yet given a name. My wife Shámávahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly, I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own name as (if he were) the son of my loins, and (he) is to pay as much respect to my wife Shámávahoo as (if she were) his own mother; and agreeably to her directions he is to act righteously. And my wife is to have this lad married, as (though he were her) own son, and upon his marriage, Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife, should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of Bhái Dwárkádás as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife Shámávahoo. If, by the will of Providence it should so happen that there may be no other son of Bhái Dwárkádás, then I appoint my nephew Dwárkádás Vasanji as the heir of my property.

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And to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner."

In 1870 this suit was filed by the plaintiff, (the widow and executrix of testator), for the purpose of having the will construed. The plaintiff (*inter alia*) complained that the defendant Dwárkádás Vasanji had refused to give his infant son in adoption to the plaintiff, and had named him Sundardás Dwárkádás, and had no other son. In his written statement, filed in 1871, the defendant Dwárkádás Vasanji denied that he had refused to give his said son in adoption. In a subsequent written statement filed on the 4th March, 1872, he informed the Court that a second son (Náranji) had since been born to him, and he submitted to the Court what were the rights and interests of such sons under the will. A decree was made in the suit in March, 1872. In January, 1873, the plaintiff presented a petition to the Court, stating that Sundardás having been born on the 29th April, 1867, was of the age of ten years and nine months; that, according to the custom of the testator's caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April, 1878; that she was ready and willing to adopt him, and had offered to do so, but that his father, (the first defendant), had refused to give him in adoption. She prayed (*inter alia*) that it might be declared that, in the event of the first defendant failing to give the said Sundardás in adoption, the first defendant and his two sons took no benefit under the said will.

The first defendant filed a counter petition in which he stated that he was always willing to give his son Sundardás to be adopted by the plaintiff on certain conditions, but that she had refused to consent to them, or to anything which would in the least interfere with her authority as a mother over the boy when adopted. He stated that the plaintiff was an adherent of a sect which held certain pernicious and immoral doctrines, to which he was much opposed, and which had been abhorred by the testator; and that, unless certain conditions, which he suggested, were imposed upon the plaintiff, the moral character of his son, if adopted, would be in danger of fatal injury.

Held, that the infant sons of the first defendant took nothing under the will, unless adopted.

Held, also, that the plaintiff was under no obligation to take the infant Sundardás in adoption on the conditions proposed by the first defendant, his natural father.

Further Directions:—The plaintiff was the widow and executrix of one Gokuldás Tejpál, a Hindu inhabitant of Bombay, who died on the 6th September, 1867, leaving much moveable and immoveable property. Probate of his will, which was dated the 6th September, 1867, was granted on the 6th July, 1868, to the plaintiff and the first two defendants, *viz.*, Dwárkadás Vasanji and Lakhmidás Khimji.

The present suit was instituted on the 24th August, 1870. The plaint prayed *(inter alia)* that it might be declared what were the rights of all persons interested under the said will or otherwise in respect of the estate of the said testator, and that the true construction of the will might be determined, and also that, if necessary, the estate of the testator might be administered by the Court, &c., &c.

The fifteenth clause of the will was as follows:—

"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife Shámávahoo, then I direct and order and appoint as follows:—There is my nephew Bhái Dwárkádás Vasanji. He has now one son, to whom he has not as yet given a name. My wife Shámávahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own

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name, as (if he were) the son of my loins, and (he) is to pay as much respect to my wife Shámávahoo as (if she were) his own mother; and agreeably to her directions he is to act righteously, and my wife is to have this lad married as (though he were her) own son, and upon his marriage Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of Bhái Dwárkádás as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife Shámávahoo. If by the will of Providence it should so happen that there may be no other son of Bhái Dwárkádás, then I appoint my nephew Dwárkádás Vasanji as the heir of my property; and to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner:—As long as my wife Shámávahoo may live, and my respected mother may live, Bhái Dwárkádás shall take care of my property, but he is not to take or withdraw anything therefrom, and appropriate it to his own use, and he is to keep up the respect and position of my wife as if she were his own mother; and after the deaths of my wife Shámávahoo and of my respected mother Gangábái, the owner of all my property is to be Bhái Dwárkádás Vasanji. I give him all my property as an inheritance. Therefore my name is always to be perpetuated by Bhái Dwárkádás Vasanji and his heirs and representatives. And he or they are to render assistance to my religious and charitable works. In respect thereof they are not to be in fault in any way."

As to this clause the plaintiff in her plaint stated as follows:—

"23. In the fifteenth clause of the said will the said Gokuldás Tejpál directed that if a child begotten by him should not be born of the womb of the plaintiff, she should, after his decease, adopt the infant son (then unnamed) of the defendant Dwárkádás Vasanji, and that if during the lifetime of the plaintiff the said son of the defendant Dwárkádás Vasanji should die without coming of age, then that the plaintiff should adopt such other son of the defendant Dwárkádás Vasanji as might be living at the time; and if it should so happen that there should be no other son of the defendant Dwárkádás Vasanji, then the said Gokuldás Tejpál appointed the defendant Dwárkádás Vasanji heir to his property (meaning his residuary estate): provided that, as long as the plaintiff and the defendant Gangábái should live, the defendant Dwárkádás Vasanji should not withdraw or appropriate to his own use any of the property of the said Gokuldás Tejpál.

"24. The defendant Dwárkádás Vasanji has refused to give his said unnamed infant son in adoption to the plaintiff, and has named him Sundardás Dwárkádás, and has no other son, and claims to be residuary legatee under the said will.

"25. The plaintiff submits that, having regard to the provisions of the said will in that behalf, the defendant Dwárkádás Vasanji, (if entitled at all), is not entitled until after the death of the plaintiff and the defendant Gungábái to any beneficial interest in the residuary estate of the said Gokuldás Tejpál."

"27. The plaintiff submits that she is entitled during her life to the income of the said residue."

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The first defendant Dwárkádás Vasanji filed a written statement in 1871, in which he impugned the plaintiff's construction of clause 15 of the will, and submitted that immediately on the testator's death the whole property mentioned in the fifteenth clause of the will vested in him as devisee and legatee in perpetuity, subject only to the limitations and directions in the will, and (amongst others) to the direction given concerning the executory limitation in trust in favour of his only son Sundardás Dwárkádás and his (the first defendant's) future male children as yet unborn.

He further denied that he had refused to give his said infant son in adoption to the testator. On the contrary he alleged that five or six days before the date of the will he had performed with the testator the preliminary ceremony in adoption, called "*wacha dataka*", by which the child had been formally asked and promised, and that it was in consequence of this ceremony having been performed that the child was mentioned in the testator's will.

The first defendant also alleged that the plaintiff since the testator's death had shown herself hostile to the performance of the directions contained in will as to the adoption, being influenced by the opinions of the sect of Wallabhácharya, which she zealously held, but to which opinions he (the first defendant) and his co-executor Lakhmidás Khimji, the second defendant, (and her deceased husband, the testator, in his lifetime) were notoriously opposed; and he submitted whether under the circumstances the plaintiff was a fit person to have custody of the said infant child when finally adopted. He stated that his infant son Sundardás was then (1871) between three and four years of age, and that by the custom of the Bhátiá caste, to which the parties belonged, adoption might take place up to eleven years of age; and that the plaintiff being, under the will, empowered to adopt at any time during her own life was not anxious to complete the incipient adoption of the child; that she refused to take the child in adoption; and that he was apprehensive for the safety of the child after adoption, unless protected by the Court.

On the 4th March, 1872, the first defendant filed a further written statement in which he informed the Court that subsequently to the filing of his first written statement, a second son (Nárronji) had been born to him, and he submitted to the Court what were the rights and interests of such son under the testator's will. He further submitted whether, in the event of the plaintiff's declining or becoming from any cause whatever unable to comply with the directions in the fifteenth clause of the will and to take Sundardás in adoption, she ought or ought not to be decreed to take in adoption the said new born son Nárronji, or any other lawful son (if any) hereafter born to the first defendant.

The case came on for hearing in March, 1872.

The decree *(inter alia)* contained a declaration that there had been no valid adoption of the said Sundardás as son of the testator Gokuldás Tejpál; "and this Court doth further declare that the mesne profits of the residuary estate since the death of the said testator will belong to the said Sundardás or other son of the defendant Dwárkádás Vasanji (as the case may be) on his becoming the adopted son of the testator according to the provisions in the fifteenth paragraph of the will contained."

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On the 24th January, 1878, the plaintiff Shámávahoo presented a petition to the Court stating that Sundardás having been born on the 29th April, 1867, was of the age of ten years and nine months; that, according to the custom of the Bhátiá caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.*, in April, 1878; that she was ready and willing to adopt him within the said period; that she had repeatedly offered to take him in adoption, but that his father, the first defendant Dwárkádás Vasanji, had always refused and still refused to give him in adoption. She prayed (1) that it might be declared that the first defendant had declined and failed to give his son in adoption according to clause 15 of the will; (2) that a reasonable time might be fixed within which the said first defendant should be directed to give the said child in adoption; (3) that it might be declared that, in the event of the first defendant Dwárkádás failing to give the said Sundardás in adoption, the said Dwarkádás and his sons Sundardás and Narranji took no benefit under the said will; and that she, (the plaintiff), was entitled to the residuary estate of the testator.

On the 24th February, 1878, the defendant Dwarkádás filed a petition in which he stated that he was always and was still willing to give his son Sundardás to be adopted by the plaintiff upon certain conditions; that these conditions had been proposed to the plaintiff, but that she had refused to consent to them, or to anything which would in the least interfere with her rights and authority as a mother over the boy when adopted. The following are the concluding clauses and prayer of his petition:—

"9. Your petitioner submits that it is competent for this Honourable Court to order in this suit that the plaintiff shall perform the ceremonies of adoption contemplated by the said testator, or such part thereof as remain incomplete, upon such terms as this Honourable Court may judge necessary to be imposed in the interests of the said Sundardás, and in furtherance of the expressed or well-known feelings and opinion of the said testator, and your petitioner also submits that it is proper and desirable in the interest of the said Sundardás that this Honourable Court should otherwise determine whether any and what terms shall be so imposed upon the plaintiff, and order the plaintiff to perform the ceremonies of adoption upon such terms (if any) as it shall have so determined to impose.

"10. Your petitioner believes and submits to this Honourable Court that it is absolutely necessary that the plaintiff should not have such right and authority over the said infant after his adoption as she demands, and that such order ought to be made as shall provide that the plaintiff shall have no control or authority whatever over or in respect of the religious and moral education or training of the said infant.

"11. The plaintiff is a devoted adherent of the sect of Vallabhácháryá, and your petitioner believes that if the plaintiff should possess and exercise such control and authority as aforesaid over the education and training of the said infant, it will be wholly impossible to guard against the mind of the said infant being influenced by the doctrines, and his character affected by the practices, of the said sect.

"12. Your petitioner says that the doctrines of the said sect, which are openly and habitually taught to, and followed by, the members thereof, are in the highest degree pernicious and abominable; that the practices usual in the said sect, which are founded on the said doctrines and are sanctioned by the teaching of the sect, are in the highest degree immoral; and that the said infant could not be exposed to the influence of the doctrines and practices of the sect without danger of fatal injury to his moral character.

"13. Your petitioner further says that the said testator held in great abhorrence the doctrines and practices generally prevailing in the said sect. Your petitioner believes that to expose his adopted son to the influence of the said doctrines and practices would be wholly at variance with the wishes of the said testator, and in disregard of his expressed and well-known feelings and opinions respecting the said sect.

"14. That your petitioner craves leave to refer to the pleadings and other records in this suit, and particularly to the two separate written statements of your petitioner with regard to the circumstances and expressed opinions of the testator, and the circumstances under which the said will was prepared and was assented to, and made and published by him.

"Your petitioner prays:—

"(1) That upon this suit being set down for further directions this Honourable Court may determine the following issues:—

"(a) The twenty-ninth issue raised in the suit as aforesaid.

"(b) Whether the terms and conditions set forth in the seventh paragraph of this petition are such as ought to be imposed upon the plaintiff with reference to the said adoption.

"(c) Whether this Honourable Court will not make such order as may be requisite for the due and proper observance of the said terms and conditions (if any) as it shall determine ought to be imposed.

"That in determining the said issues this Honourable Court will, if necessary, have regard to the circumstances and expressed opinions of the said testator and the circumstances under which the said will was prepared and was assented to, and made and published by him.

"That, if necessary, this petition may be read as a written statement in this suit."

The two infant sons of the first defendant, *viz.*, Sundardás and Nárronji, had been made defendants in the suit. Their guardian *ad litem*, Mathurádás Lowji, also presented a petition to the Court, dated 23rd February, 1878, in which he submitted that certain terms and conditions should be imposed on the plaintiff in adopting Sundardás. These conditions were substantially those which had been proposed by Dwárkádás Vasanji to the plaintiff, and had been rejected by her. They were as follows:—

"1. The moral and religious education of Sundardás shall consist of instructions according to the morality and religious principles contained in the Vedás,

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being the original religion of the Hindus, and according to no others; and he shall be carefully excluded from the Vallabhácháryа sect, and from all knowledge of their doctrines.

"ij. The secular education of Sundardás shall consist of the best English education, until he shall have taken the highest degree in the University of Bombay.

"iii. What is commonly known in high schools as the second language should be the Sanskrit language, and should be taught to Sundardás, in order to enable him to understand the pure and original Hindu religion which is taught in the writings of that language.

"iv. The education of Sundardás should be entrusted to a teacher, being a Gujaráti Hindu thoroughly qualified in English and Sanskrit, and, if possible, one who shall have taken a degree in the University of Bombay; and Sundardás shall at all times be under the guidance of such teacher, and the teacher shall be constantly with him.

"v. Sundardás is to marry a woman of his own choice after having attained the age of eighteen years.

"vi. Sundardás is to be permitted to live with the plaintiff and his natural father from time to time according to his wishes.

"vii. A fit and proper guardian should be appointed, who should be a Hindu gentleman."

The case now came before the Court for further directions. After some discussion the Court raised the following issues:—

33. Whether the infants Sundardás and Náranji, or either of them, take any and what interest in the residuary estate in the event of their not being adopted?

34. Whether Shámávahoo is bound to accept the infant Sundardás in adoption upon the conditions mentioned in the petition of Mathurádás Lowji?

35. Whether, in the event of her refusing to adopt upon such conditions, this Court can and will execute the trust (if any) reposed in Shámávahoo?

Lang and *Telang* for the plaintiff.

Marriott, (Advocate General), and *Pigot* for Dwárkádás Vasanji.

Taylor and *Wágle* for the executors.

Latham and *Inverarity* for Mathurádás Lowji, the guardian of the infant Sundardás.

On behalf of the infant the following authorities were cited:—Lewin on Trusts, (5th ed.), p. 593; *Brown* v. *Higgs*(1); *Burrough* v. *Philcox*(2); Specific Relief Act I of 1877, sec. 30; *Prasannamayi* v. *Kadumbrul*(3); *Rajdhli* v. *Bálá Venkatesh Ramakánt*(4); *Rupchand Hindumal* v. *Rukhmábái*(5); *Bhagvándás Tejmal* v. *Rajmal*(6); *Gower* v. *Mainwaring*(7); *Chitko* v. *Jánki*(8); Manu, ch. 5, secs.

(1) 4 Ves. 708, 5 Ves. 495, and 8 Ves. 561.
(2) 5 M. & Cr., at p. 92.
(3) 3 Beng. L. R., O. J., 85.
(4) 7 Bom. H. C. Rep., Appx., pp. 10-21.
(5) 8 Bom. H. C. Rep., A. C. J., 118.
(6) 10 Bom. H. C. Rep., 241.
(7) 2 Ves., 87.
(8) 11 Bom. H. C. Rep., 199.

147-148; *Morrall* v. *Sutton*(1); *In re Blake's Trust*(2); *Humphreys* v. *Humphreys*(3); *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*(4); *Abhai Charan Ghose* v. *S. M. Dasmani Dasi*(5); *Warren* v. *Rudall*(6); *Child* v. *Elsworth*(7); *Walker* v. *Tipping*(8); *Compton* v. *Bloxham*(9); *Gauntlett* v. *Carter*(10).

On behalf of Dwárkádás Vasanji the following authorities were cited:—*Skimmer* v. *Orr*(11); *Bhdu Nánáji* v. *Sundardbái*(12).

On behalf of the plaintiff the following authorities were cited:—Norton's Leading Cases, Vol. I, p. 58; *Rungama* v. *Alchama*(13).

SARGENT, J.:—This suit came before the Court for further directions on the 26th February last, in order that a finding might be recorded on certain questions arising out of the will of the late Gokuldás Tejpál, and which have since been raised in the following issues numbered 33, 34, 35 in this suit:—

33. Whether the infants Sundardás and Nárrondás, sons of Dwárkádás Vasanji, or either of them, take any and what interest in the residuary estate of the late Gokuldás Tejpál in the event of their not being adopted?

34. Whether Shámávahoo is bound to accept the infant Sundardás in adoption upon the conditions mentioned in the petition of Mathurádás Lowji?

35. Whether, in the event of her refusing to adopt upon such conditions, the Court can and (if so) will execute the trust (if any) reposed in Shámávahoo?

The question raised by the first of these issues turns upon the construction to be put upon the fifteenth clause of the will, which is in the following words:—

"During my lifetime, or subsequently to my decease, should a child begotten by me not be born of the womb of my wife Shámávahoo, then I direct and order and appoint as follows:—There is my nephew Bhái Dwárkádás Vasanji. He has now one son, to whom he has not as yet given a name. My wife Shámávahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in this my testamentary writing has been done accordingly, I give him, as inheritance, all the residue of my property left at the time, and I appoint him as my heir. The lad is to perpetuate my own name as if he were the son of my loins, and he is to pay as much respect to my wife Shámávahoo as if she were his own mother; and agreeably to her directions he is to act righteously, and my wife is to have the lad married as though he were her own son, and upon his marriage Rs. 20,000 are to be expended out of my property. And if during the lifetime of my wife should this lad die without coming of age, then my wife is duly to take in adoption such other or second son of Bhái Dwárkádás as may be living at the time, and he is duly to be treated as my son. All are duly to act towards him in all respects, agreeably to what is written above, and he is to obey my wife Shámávahoo. If by the will of Pro-

(1) 1 Ph., 533.
(2) L. R., 3 Eq., 799.
(3) L. R., 4 Eq., 475.
(4) L. R., 2 Ind. Ap., 253.
(5) 6 Beng. L. R., 623.
(6) 4 K. & J., 603.
(7) 2 DeG. M. & G., 679.
(8) 9 Hare, 800.
(9) 2 Coll., 201-203.
(10) 17 Beav., 586.
(11) 14 Moore's I. A., 309.
(12) 11 Bom. H. C. Rep., 257-8.
(13) 4 Moore's Ind. Ap., 89.

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vidence it should so happen that there may be no other son of Bhái Dwárkádás, then I appoint my nephew Dwárkádás Vasanji as the heir to my property; and to him I give as an inheritance all the residue of my property left at the time, in the following manner, &c., &c."

But before proceeding to discuss the language of that clause, it will be convenient to consider the decisions cited at the Bar which have been already arrived at on testamentary provisions of a similar nature.

In the case of *Doss Money Dossee* v *Prosonomoye Dossee*(1) the testator directed his wife, (in a certain event which the Court considered had arisen), to adopt the two sons of his two uterine sisters, in doing which there should be no deviation, and he further directed that if his wife should not adopt the children after his decease, then his executors should, according to his will and in pursuance of the permission given by him, cause the said two children to be adopted. The widow made no adoption after her husband's death, and ultimately claimed the property of her husband, on the ground that he had died intestate, except as to any property he had specifically bequeathed, and filed a suit against the executor for an account. Mr Justice Phear, doubting whether the event had occurred on which power was given to the widow to adopt, held that in any case there was no intention to make the sons of the two sisters devisees, and that not having been adopted, they took nothing. On appeal, however, before Sir Barnes Peacock C.J., and Norman, J., it was held that the event had occurred on which the widow was to adopt; that the power might be exercised any time during her life, and that whether or no the adoption of two sons would be a legal adoption, the sons when adopted were intended to take, or as it was there was an implied gift to them.

The same will was considered by Phear, J., in *Abhoe Charan Ghose* v *Dasmani Dosi*(2), on which occasion the learned Judge, not considering himself bound by the decision of the Court of Appeal in the former case, expressed his dissent from the conclusion arrived at by that Court as to there being a devise by implication to the sons of the sisters, and adhered to his former decision. The language of the Court of Appeal is scarcely as clear as might be wished; but I gather that the point on which the two Courts differed was whether there was a gift to the sons if adopted by the widow; whether or no such adoption was a legal one; and that the Court of Appeal held there was.

In the case of *Suddessoary Dossee* v *Doorga Churn Setth*(3) the will recited erroneously as it turned out, that the testator and his wife had adopted two boys, Hem Chunder and Moti Lál Byrack, and then proceeded to say: "According to our *Shástra* the said two adopted sons will perform our obsequies and shall become 'heirs' successors to our property;" and Phear, J., held that, assuming the words to amount to a substantive gift, still the gift was conditional on the boys being adopted;—the character of adopted son and the capacity to perform the obsequies being, as the learned Judge considered, the moving consideration for the

(1) 2 Ind. Jur., p. 18. (2) 6 Beng. L. R. 652.
(3) 2 Ind. Jur. p. 32. 8 C. 1 Bourke, 360.

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In *Monemothonauth Dey* v. *Onontnauth Dey*(1) the testator began his will by stating that he had adopted two sons—the elder to his elder wife to bring up, and the younger to his younger wife to bring up,—both of them to be nurtured as sons born of their own womb. That he provided that if either of his two sons should die without issue, the wife whose foster son should have died should take another son in adoption, and he gave his property in equal shares, subject to certain legacies, to his two adopted sons. The plaintiff is the elder of the sons. The younger one died an infant without issue, upon which his mother in adoption in exercise of the power reserved to her by the will adopted the defendant in place of her deceased adopted son.

The Court (Trevor, J., *dissentiente*) consisting of Sir B. Peacock, C.J., and Shrinitronauth Pandit, J., held that whether the adoption by the widow was valid or not, still that it was the intention of the testator that she should adopt, and that the defendant fulfilled the terms of the will, and was entitled to half the property. This decision appears to be in accordance with that arrived at in the first-mentioned case.

Lastly, in the case of *Nidhoomoni Dabya* v. *Saroda Pershad Mookerjí*(2) the words of the will were: "As I am desirous of adopting a son, I declare that I have adopted K., third son of my eldest brother. My wives shall perform the ceremonies according to the *Shástrás*, and bring him up; and until the adopted son comes of age, those executors shall look after and superintend all the property, also that adopted son. When he comes to maturity the executors shall make over everything to him. Should this adopted son die, and my younger brother Nilruthan have more than one son, then my wives shall adopt a son of his. If at that time Nilruthan has not a son eligible to adoption, they shall adopt another son of Sawds, and the wives and executors shall perform all the abovementioned acts."

The Court in its judgment says: "The argument raised by two questions (1) whether the ceremonies were necessary for the completion, or whether all that was necessary to it had been done by the testator, who in his lifetime received the child, the child having been given by his natural father; (2) supposing these ceremonies to be necessary, whether power having been given to the two widows, the ceremonies could be validly performed by one. But it appears to their Lordships that neither of these questions arises in this case.

"The effect of the will, according to their view, is this: 'I declare that I give my property to Koibutto, whom I have adopted.' There is a gift of his property to a designated person. This direction follows:—'My wives shall perform the ceremonies according to the *Shástrás*, and bring him up.'

"Undoubtedly the testator desired and expected that the wives should perform certain ceremonies. He requested them to do so, but it appears to their Lordships that it would be an altogether erroneous reading of the will to suppose that he intended the taking of his property by Koibutto to be entirely dependent on whether the wives choose or did not choose to perform the ceremonies."

(1) 2 Ind. Jur., p. 24. (2) L. R., 3 Ind. Ap., 255.

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Here the circumstance that the testator had so far adopted Koibutto as to receive him in adoption, (a fact which, I gather from the judgment, was not in dispute,) was a strong reason for concluding that it could not have been his intention to make the mere performance of the religious ceremonies by his wives (whether necessary or not to constitute a legal adoption) a condition precedent of the devise taking effect.

No special rule of construction is, I think, to be gathered from these decisions. They all deal with the question as one of intention, to be gathered from the language of the particular will.

Now it scarcely admits of a doubt that if the words "and after what is mentioned in my testamentary writing has been done accordingly" apply, as was contended for the widow, to the adoption of the boy, as directed by the testator in the sentence immediately preceding, the object of the gift of this inheritance can only be the boy when so adopted. In other words, the *persona designata* is not the son of Dwárkádás Vasanji, but such son when adopted. That would be the plain and obvious meaning of the testator's language.

It was contended, however, for the infant Sundardás that those words do not refer to the act or ceremony of adoption, but to the payment and setting apart of the various legacies and charitable bequests as directed by his will, and that they are to be read in connection with the word "residue", so that the sentence would run thus :—"I give him as an inheritance the residue of my property after what is mentioned in my will has been done."

Mr. Flynn was examined as to the correct translation as to this passage. His evidence was to the effect that the vernacular word "*teni*", with which it commences, and which may be translated "him" or "to him", is at an unusual distance from the verb "I give", if intended to be its object. On the other hand, he says that it would not be idiomatic, although grammatical, to use "*teni*" without some such word as "*bábat*" (meaning, literally, "in regard" or "respect to") if it were intended to be the object of the verb translated "done" or "doing", and he inclines to the opinion that it is governed by the verb "give". As to the rest of the clause, he says it may be literally translated—"According in my will written having been done (or doing) at that time, the remainder of my whole property I in heritance give." The words "at that time" must refer to the epoch ascertained by the preceding words "according in my will having been done or doing." As to which Mr. Flynn admits that, grammatically, they may refer either to the adoption of the boy, or to the providing forth as directed by the will.

Now it is to be remarked that in two other passages in the will where the testator is appointing an heir in certain events, as at the close of clause 14 and later on in clause 15 when he is appointing Dwárkádás his heir, he uses the same expression, "my property left at the time," in which cases there can be no doubt that the time referred to is the time at which the gift takes effect. Again, if those words are introduced only to amplify the term "residue", (which must be the case if the devise to Sundardás took effect at once on the death of the testator) as being what remained after the several bequests and legacies have

been satisfied, the testator might have been expected to use the same detailed form of expression on the occasion when speaking of the "residue" of his property, or at least in the earlier passage in the will when that term is used, as in clause 14, where he is appointing his natural son as heir, or disposing of the residue in the events mentioned at the conclusion of that clause. Further, the introduction of these words, in the sense contended for on behalf of the infant, between the verb and its object, it is plain from Mr. Flynn's evidence, is awkward and unusual; whilst, on the other hand, if interpreted as referring to the adoption immediately before directed to be carried into effect, their introduction in their actual place is easy and natural, and accounts for the word "*teni*" being removed so far from the verb which, as Mr. Flynn thinks, governs it.

Those considerations appear to me to point to the conclusion that, whether the word "*teni*" is to be taken in connection with the words following or as the object of the verb give, the words under discussion refer to the carrying out the adoption, and not the providing for the legacies and charitable bequests mentioned in the will.

Lastly, an examination of the original shows there is no stop of any kind in clause 15 until after the words "he is to be made my adopted son." There is then a full stop, which I am told by the interpreter has come into use for the purpose of showing that the sentence is concluded.

In construing English wills it has not been the practice to pay regard to the punctuation or paranthesis, because, as said in *Sandford* v. *Raikes*(1), it would make the construction depend on the grammatical skill of the writer. However in *Compton* v. *Bloxam*(2) Vice-Chancellor Knight Bruce looked at the original, and relied on the circumstance that the words "my monies" began an entirely new sentence. The circumstance that there is no such thing as punctuation, properly so called, in native writings, but merely a practice—by no means general—which has grown up of making a dot to denote the end of a sentence, gives the existence of a dot a special importance, which the Court may, I think, take note of without any such risk as was contemplated by Sir W. Grant in *Sandford* v. *Raikes*.

The circumstance that the words "him according to my will having been done" come immediately after the sentence thus concluded, points strongly to the conclusion that by "him" at any rate was intended the boy who answered to the complete description of being the natural son of Dwárkádás and also the adopted son of the testator.

Leaving the passage which has been hitherto under consideration we find the following words:—"This lad is to perpetuate my name as if he were the son of my loins." Next, in the event of the lad dying before coming of age, he directs that such other son of Dwárkádás as may be living be adopted without employing any words of gift, and it is only in case there be no other son that he appoints Dwárkádás, who would otherwise have been his heir, at least on the death of his wife, to be his heir. Thus showing that the permanent motive in the testator's mind was the perpetuation of his name and family by the Hindu ceremony of adoption.

(1) 1 Mer., 551. (2) 2 Coll., 201.

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It was said, indeed, that there was a gift by implication to the other sons of Dwárkádás, whether adopted or not, by force of the words "if by the will of Providence it should happen that there be no other son of Dwárkádás, then I appoint my nephew Dwárkádás Vasanji as the heir to my property." But the testator is here only providing for an event which would render his previous direction ineffectual for want of an object, and his words cannot be reasonably read as implying that such other son should take independently of adoption. This would be to impute entirely inconsistent intentions to the testator at one and the same time.

Lastly, the directions in clause 23 as to the "power" to be obtained from the Court show that the natural *status* of the sons were, in the testator's mind, entirely merged in the new *status* by adoption, as directed in his will, and that he did not contemplate them as taking this property in any other character.

It was said, however, that the will shows an anxious desire, on the part of the testator, to appoint an heir in every event that was likely to occur, and which, it was urged, renders it improbable that he should have intended adoption to be a condition of heirship. It is doubtless true that the will provides for nearly every possible event, but the nature of those provisions leaves no doubt that the paramount object he had in view was that he might always be in the favourable position of one having a son to perpetuate his name. After providing for the event of his having a son by his wife before he died, he contemplates the event of that son dying in infancy, and there being a daughter by his wife who may have married and have a son. As that son would, by the Mitákshara (see West and Bühler on Inheritance, p. 115, and the cases cited), be, in respect of obsequies, regarded as a son's son, and capable of conferring equal benefits, he gives his property to his daughter, who would in that event be his next heir (supposing his wife excluded). At the same time he provides that, if she should die before her son arrives at sixteen, that the son should be adopted into his own family, and thus continue his name. Lastly, he provides for his having no offspring by his wife, in which case the persons whom he selects would not, unless adopted, be capable of conferring on him the benefits of a son, or perpetuating his name, and he consequently directs them to be adopted.

The whole scope of the will, in my opinion, indicates that the object the testator had in view was to ensure to himself all the benefits which a son (in the largest sense in which that term is employed by Hindu writers) is supposed to confer on his father.

And, moreover, this view of the testator's intention derives corroboration from the circumstances under which the will was made. The will apparently assumes that Dwárkádás is ready to give his son in adoption; and it appears, from the evidence of Mathurádás Lowji, that the testator had been in communication with Dwárkádás with the view to his giving his son in adoption, and that the latter had ultimately agreed to do so.

Upon the whole of the will I must decide that the infant sons of Dwárkádás Vasanji take nothing under the will, unless adopted.

As to the 34th issue I expressed an opinion at the hearing, which I have since seen no reason to change, viz , that Shámávahoo is under no obligation to take the infant Sundardás in adoption on the conditions upon which Dwárkádás is alone ready to give him in adoption

Assuming that the direction by the testator to his wife to adopt Sundárdás makes her a trustee for the exercise of the power to adopt, and that the case falls within the principle laid down by Lord Eldon in *Brown* v *Higgs*(1) namely that the Court will not allow the interest of those for whose benefit she is called upon to execute the power, to suffer by the negligence or conduct of the donee of the power I am unable to find anything in the circumstances of this case which would justify the interference of the Court assuming that it has the power to do so It is admitted that the father of the child is unwilling to give him in adoption except upon conditions of a most stringent character which would virtually deprive Shámávahoo of all control over the bringing up and education of the child The conditions are set out in the petition of Mathurádás Lowji, the next friend of the infant and are to the following effect —

"i. The moral and religious education of Sundardás shall consist of instructions according to the morality and religious principles contained in the Vedás being the original religion of the Hindus, and according to no others, and he shall be carefully excluded from the Vallabháchárya sect, and from all knowledge of their doctrines

"ii The secular education of Sundardás shall consist of the best English education until he shall have taken the highest degree in the University of Bombay

"iii What is commonly known in high schools as the second language should be the Sanskrit language and should be taught to Sundardás, in order to enable him to understand the pure and original Hindu religion which is taught in the writings of that language

"iv The education of Sundardás should be entrusted to a teacher, being a Gujaráti Hindu thoroughly qualified in English and Sanskrit, and, if possible, one who shall have taken a degree in the University of Bombay, and Sundardás shall at all times be under the guidance of such teacher and the teacher shall be constantly with him

"v Sundardás is to marry a woman of his own choice after having attained the age of eighteen years

"vi Sundardás is to be permitted to live with the plaintiff and his natural father from time to time according to his wishes

"vii A fit and proper guardian should be appointed, who should be a Hindu gentleman. '

The first four of these conditions lay down a scheme of education The fifth condition regulates the choice of his wife and in a manner which implies that Shámávahoo is to have no voice in it, it further fixes the age at which he is to marry far beyond the usual custom of Hindus The sixth condition leaves it virtually to the boy to decide with whom he will live, and it would be affecta

(1) Ves. 708, 5 Ves 495 and 8 Ves. 561

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tion to shut one's eyes to the almost inevitable result of such a condition, *viz.*, that the child, (especially in view of the angry relations subsisting between the father of the child and the widow), would elect to live with his natural parents. Lastly, the seventh condition provides that a guardian be appointed to the child.

These conditions, excellent as they may be abstractedly speaking, leave no doubt that the object of the father is, practically, if not in terms, to deprive Shamávahoo of the rights which as the mother of the adopted child she would by Hindu law be otherwise entitled to.

The Hindu law books abound in texts to show that by adoption the child is transferred from the family of his natural parents into that of the adopting parents, and that the relation of mother and son is established between the adopting mother and the adopted son. If that be so, how can it be said that Shámávahoo is violating the trust reposed in her when she refuses to accept Sundardás upon such conditions as would curtail and injuriously affect her rights as his adopting mother?

The will imposes no such conditions on her, but contemplates adoption in its simple and ordinary form. "My wife is to take that son in adoption"—to which are added expressions showing his complete confidence in Shámávahoo. He says, speaking of the boy, he is to pay as much respect to his wife Shámávahoo as if she were his own mother, and agreeably to her directions he is to act righteously, and she is to have the lad married as if he were her own son. Again, when speaking of the adoption of the other son of Dwárkádás, he says: "he is to obey my wife Shámávahoo."

If Dwárkádás has not the same confidence in Shámávahoo that her husband appears to have had, or if her conduct since her husband's death as an alleged devotee of the Mahárájás be not such as to meet with his approval, he may perhaps be morally justified in not fulfilling his promise to the testator to give his son in adoption; but as long as she is willing to act according to her husband's directions, what ground is there for this Court, (assuming that it had such a power), to interfere?

It is said in Dwárkádás' petition and correspondence, annexed, that Shámáhoo is a worshipper of the Mahárájás; and that, if the testator were now alive, he would himself wish that the child should be adopted subject to the above conditions; and that this Court ought, therefore, to compel Shámávahoo to adopt on such terms. It would, however, lead to most inconvenient consequences if this Court were to allow itself to be drawn into questions of religious difference between the various Hindu sects, except where it was absolutely necessary for the determination of legal rights. In the present case the testator has not only reposed complete confidence in his wife, but has recognized the worship of Mahárájás, as at least not reprehensible, by making a bequest in support of such worship. The petition contains no specific charges of improper conduct on the part of the widow, but is confined to general imputations on the sect. If it be true, as Dwárkádás and Mathurádás Lowji suggest, that the conduct of the worshippers of the Mahárájás is such as to make a woman an improper guardian of youth, it will be time to consider that when Shámávahoo fills the character of mother to the

adopted Sundardás. If at that time the conduct of Shámávahoo should be such as to render her an improper person to have the charge of bringing up of the child, I apprehend the Court would act upon the general principles by which it is guided in removing children from the control of their natural parents.

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I find issues 33 and 34 in the negative, and record none on the 35th.

Costs of hearing on further directions of all parties to come out of the estate, to be taxed between attorney and client.

Costs of, and incidental to, the two petitions to be borne by the petitioners themselves.

Attorneys for plaintiff:—Messrs. *Hearn, Cleveland, and Peile.*

Attorneys for the defendants:—Messrs. *Crusoe, Lynch, and Owen*, and Messrs. *Jefferson and Payne.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

VENKATESH GOVIND, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MA'RUTI (ORIGINAL DEFENDANT), RESPONDENT.*

1887. *September 5.*

Lis pendens—Mortgage—Purchase, without notice, of land declared liable for mortgage-debt by a decree.

In 1864 A. mortgaged four shops to the plaintiff's father. Subsequently, however, A.'s father brought a suit, and obtained a decree declaring that two of these shops were not included in the mortgage. In 1869 the plaintiff's father, (the mortgagee), sued A. upon the mortgage, and prayed in the same suit that certain other land not included in the mortgage-deed might be held liable for his debt in lieu of the two shops. He obtained a decree on the 29th November, 1869, which ordered Rs. 1,201 to be paid "on the liability of the land in the plaint mentioned." No steps were taken by the plaintiff to execute this decree for seven years. On the 18th August, 1876, A. sold to the defendant, by a registered deed of sale, a portion of the land so declared liable, and the defendant entered into possession without notice of the plaintiff's decree. The plaintiff now sued to obtain a declaration, that the land was liable to be sold in execution of his decree of 1869. Both the lower Courts dismissed his suit. On appeal to the High Court,

Held, that the defendant was a purchaser for value, without notice of the plaintiff's decree, and took the land unaffected by the plaintiff's equitable lien created by the decree. There was no *lis pendens*. The *litis contestatio* had ceased. The decree, which was a final one, had terminated the litigation between the parties, and now only remained to be executed. There was, moreover, in this case the further circumstance that nothing had been done in the suit after the decree and during the seven years which elapsed between it and the defendant's purchase in 1876.

THIS was a second appeal from a decision of G. Druitt, Acting District Judge of Kánara.

* Second Appeal, No. 397 of 1885.

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By an unregistered deed, dated the 15th August, 1864, one Apaya mortgaged four shops to the father of the plaintiff. Subsequently, however, Apaya's father brought a suit, and obtained a decree declaring that two of the shops, which had been mortgaged by Apaya, were not subject to the mortgage. In 1869 the father of the plaintiff, (the mortgagee), sued Apaya on the mortgage, and in the same suit prayed that certain other land not included in the mortgage might be declared liable for the mortgage-debt, in lieu of the two shops. He obtained a decree on the 29th November, 1869, by which Rs. 1,291 and interest from the date of the plaint were ordered to be paid "on the liability of the land in the plaint mentioned".

No steps were taken by the plaintiff to execute the decree. On the 18th August, 1876, Apaya sold a portion of this land to the defendant, who had no notice of the plaintiff's decree. The defendant obtained possession, and got his sale-deed registered.

The plaintiff—his father having died—now sued to have it declared that the land was liable to be attached and sold in execution of the decree obtained by him in 1869.

The defendant contended that the land was not included in the mortgage, on which the plaintiff's decree was passed; that the mortgage-deed obtained by the plaintiff's father was not registered, and that he, (the defendant), was in possession under a registered deed of sale passed by Apaya.

Both the lower Courts dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant:—The plaintiff's decree of 1869 had bound the land, no part of which could be alienated before the decree had been fully executed. The defendant's purchase was a purchase *pendente lite*. Litigation comes to an end with the execution of a decree; until that time it operates as notice.

Shámráv Vithal for the respondent:—The purchase by the defendant is unaffected by the decree of the plaintiff. He was a purchaser for value without notice. The doctrine of *lis pendens* cannot apply to the present case. To constitute *lis pendens* there

must be a continuous prosecution of a suit · see White and Tudor's Leading Cases, Vol. II, p. 79. Act IV of 1882 adopts in section 52 the same principle. The sale to the defendant was in 1876, and the plaintiff not having taken steps to execute the decree of 1869, cannot now impeach the defendant's purchase. Even if the decree be considered as creating a charge on the land in question, the defendant's purchase cannot be affected, his title having been completed by possession. Here is an equitable lien of the plaintiff as against the defendant's legal title.

SARGENT, C. J. :—In this case one Apaya mortgaged four shops to plaintiff's father on the 15th August 1864—the bond not being registered. Apaya's father subsequently obtained a decree declaring that two of the shops were not liable to the mortgage, and in 1869 plaintiff's father sued on the mortgage-bond, and also prayed that certain land not included in the mortgage might be held liable for the debt in lieu of the two shops. A decree was passed on the 29th November, 1869, by which Rs. 1,291 and interest from date of plaint were ordered to be paid "on the liability of the land in the plaint mentioned." On the 18th August, 1876, Apaya sold a portion of this land to defendant, who obtained possession from Apaya without notice of the plaintiff's decrees. This sale-deed was registered.

The Acting Judge held, on the authority of *Kanu Khandu* v *Krishna Bhuláji Shet* [1], that the defendant's deed of sale was entitled to preference. In that case the ordinary decree in a suit on a mortgage-bond had been passed for the recovery of the money from the mortgaged property, but it was held that the decree could not have the effect of possession under the mortgage; and that a subsequent purchaser, without notice of the decree or mortgage, had a preferable right, and obtained a title free from the mortgage lien. It has, however, been contended before us that, although a decree may not, of itself, be notice, there was, in the present one, a *lis pendens* until execution of the decree of 1869. That decree, directing that the plaintiff should recover the mortgage-debt "on the liability of the land mentioned in the

(1) 5 Bom H. C. Rep., 147, A C. J.

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plaint," is virtually, although not in form, the same as is made in every suit to enforce an existing mortgage. The only difference being that the decree in this case would have to be executed by attachment and sale. In Sugden on Vendors and Purchasers, p. 760, it is said: "Decrees are not notice to a purchaser, but the *lis pendens* is not terminated where the decree does not put an end to the suit." But in *Kinsman* v. *Kinsman*(1), Lord Lyndhurst says: "In order that there may be a *litis pendentia* there must be a continuance of *litis contestatio*," and the case of a decree for account in an administration or creditors' suit is an illustration of this proposition. In *Higgins* v. *Shaw*(2), Lord St. Leonards says: "A decree for account does not put an end to a suit; it is a continuance of the litigation, and, consequently, the suit operates as notice to all the purchasers." Here, however, the decree was a final one, the litigation between the parties, which had for its subject the liability of other property than what was contained in the mortgage-bond for the payment of the mortgage, was terminated by the decree, which only remained to be executed against that property. In other words, the *litis contestatio* had ceased.

The cases cited for the plaintiff are not in point. In the Privy Council decision in *Bazayet Hossein* v. *Dooli Chund*(3), it is not plain whether the mortgage-bond was executed after the decree in the suit instituted by the widow Tayyuban, but, assuming it to have been so, the decree directed an account to be taken, which brings it within the class of cases above mentioned. In *Rávji Náráyan* v. *Krishnáji Lakshman*(4), the plaintiff purchased under a common money-decree, and, therefore, subject to the previous mortgage and decree, and the question whether there was *litis pendentia* after decree did not arise. But, apart from the above considerations, there is in the present case the further circumstance that nothing was done in the suit after the decree and during the seven years which elapsed between it and the date of defendant's purchase in 1876. In *Kinsman* v. *Kinsman*(5), Lord Lyndhurst says: "Without going so far as to say with

(1) 1 Russ. & M., 622.
(2) 2 Dr. & War., 361.
(3) I. L. R., 4 Calc., 409
(4) 11 Bom H C. Rep, 139.
(5) 1 Russ & M., 622.

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Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something must be done to keep it alive and in activity"—and again "there must be a continuous *litis contestatio*." The suit in which the decree of 1869 was passed cannot, therefore, in our opinion, affect the defendant's title as a *lis pendens*. The defendant was a purchaser for value without notice of the plaintiff's decree, which created the lien on the land from Apaya, who was in possession at the time, and he, therefore, takes unaffected by the plaintiff's equitable lien created by the decree.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *September* 5.

BHUNDAL PA'NDA' AND OTHERS, (ORIGINAL DEFENDANTS), APPLICANTS, *v.* PANDOL POS PA'TIL AND OTHERS, (ORIGINAL PLAINTIFFS), OPPONENTS.*

Fishery—Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act I of 1877, *Sec.* 9—*Practice—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 30 *and* 622—*Objection under section* 30 *where suit is under section* 9 *of Specific Relief Act.*

The plaintiffs were fishermen belonging to the village of N. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nágothna creek between high and low water mark, within certain limits set forth in the plaint, and, under section 9 of the Specific Relief Act I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section.

Held, that the first Court did not act without jurisdiction, the right claimed coming within the denomination of immoveable property.

It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under section 30 of the Civil Procedure Code (Act XIV of 1882).

* Extraordinary Application, No. 52 of 1887.

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Held, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under section 622 of the Civil Procedure Code.

APPLICATION, under the extraordinary jurisdiction of the High Court, against an order by Ráv Sáheb A. K. Kothárc, Subordinate Judge of Pen, in the Thána District.

The plaintiffs were fishermen belonging to the village of Naoghar. They claimed in this suit, for themselves and the other fishermen of that village, the exclusive right of fishing in the Nágothna creek between high and low water mark, within certain limits mentioned in this plaint, and sought, under section 9 of the Specific Relief Act I of 1877, to recover possession of that right from the defendant, who, they alleged, had dispossessed them within six months before the filing of this suit. No notice of the institution of the suit was, however, given to the other fishermen joined as co-plaintiffs.

The Subordinate Judge made an order directing possession to be restored to the plaintiffs.

Against this order the defendants presented the present application to the High Court, and contended *(inter alia)* that the order of the Subordinate Judge was without jurisdiction, the right to fish not being immoveable property within the contemplation of section 9 of the Specific Relief Act, and that the suit had not been instituted in accordance with the provisions of section 30 of the Civil Procedure Code (Act XIV of 1882).

A *rule nisi* was granted on the 28th April, 1887.

The rule now came on for hearing.

Branson, (*Mahádev Chimnaji A'pte* with him), for the defendants in support of the rule:—From the plaint itself it appears that the plaintiffs were not in possession, and this suit does not lie under section 9 of the Specific Relief Act. For the purposes of that section there must be some tangible immoveable property of which the person suing is dispossessed—the property capable of physical possession. It has been held that immoveable property does not include incorporeal rights. A right to fish is of

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that class: see *Haro Dyal Bose* v. *Kristo Gobind Sein*[1]. That case was under section 15 of Act XIV of 1859, which is similar to section 9 of the Specific Relief Act. Further, the place, in which plaintiffs claim the right to fish, is Government property, to which the plaintiffs have no right, by prescription or otherwise: see *Viresa* v. *Tatayya*[2]. The right to fish is not a tangible right to immoveable property—*Krishna Dhone Dutt* v. *Troilokia Náth Biswás*[3]. The object of the Legislature in framing section 9 was simply to provide a summary remedy in cases of interference with the right to physical possession. The suit in the present case was instituted without the authority of the other fishermen of the plaintiffs' village, and without any notice of the institution of the suit, as required by section 30 of the Civil Procedure Code (Act XIV of 1882), and this is an irregularity which justifies the Court's interference under section 622 of the Code, the proceedings in the suit being without jurisdiction, and there being no appeal or review even given against an order under section 9 of the Specific Relief Act.

Pándurang Balibhadra, contra:—A right to fish is immoveable property within the contemplation of section 9 of the Specific Relief Act. The General Clauses Act I of 1868 defines by section 2 what is included in the term "immoveable property". The right to fish is a benefit arising out of land within the definition.

The Registration Act III of 1877 includes "fisheries" in the definition of immoveable property. As the right to fish is immoveable property, it is capable of possession. If the Legislature intended that section 9 of the Specific Act should relate only to immoveable property capable of physical possession, the word "tangible", which has been used in the Criminal Procedure Code, (Act X of 1882), sec. 145, would have been inserted before the word "immoveable" property in that section. The Subordinate Judge has properly exercised his jurisdiction, and his decision cannot be interfered with under the extraordinary jurisdiction of the High Court. If the defendants are dissatisfied with the finding of the Subordinate Judge under the section, which is the

(1) 17 Calc. W. R. Civ. Rul., 70. (2) I. L. R., 8 Mad., 467.
(3) I. L. R., 12 Calc., 539.

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same as section 15 of Act XIV of 1859, their remedy is by a separate suit, and not by application under the extraordinary jurisdiction. See *Doorga Soonduree Debia* v. *Kashee Kant Chuckerbutty*(1). The suit was rightly constituted, and the omission to give notice under section 30 of the Civil Procedure Code (Act XIV of 1882) does not of itself constitute such an irregularity as to justify interference under the extraordinary jurisdiction of this Court.

SARGENT, C.J. :—The plaintiffs in this suit, who are some of the fishermen of the village of Naoghar, claim for the fishermen of that village the exclusive right of fishing in the Nágothna creek between high and low water, within certain limits mentioned in their plaint, and seek, under section 9 of the Specific Relief Act, to recover possession of that right from the defendants, who, they allege, had dispossessed them within six months before the filing of the suit. The Subordinate Judge made an order that possession should be given to the plaintiffs. It has been contended that this was beyond his jurisdiction, the right of fishing not being immoveable property within the contemplation of the above section. The right claimed is the right of excluding the public from a particular part of the sea, and would constitute what is technically termed a "common of fishery," and, being a private right of fishery as distinguished from the right of the general public to fish in the sea and navigable rivers, would, as pointed out by Sir Michael Westropp in his very learned judgment in *Baban Mayacha* v. *Nagu Shravucha*(2), come under the denomination of immoveable property.

It has been urged, however, that immoveable property in the above section does not include incorporeal rights, and the case of *Haro Dyal Bose* v. *Kristo Gobind Sein*(3) was referred to in support of that contention. The Court in that case expressed an opinion that a "suit to enforce a right of way did not fall under the provisions of section 15, Act XIV of 1859", on the ground that "ordering an obstruction to be removed was not giving possession, as is contemplated by the section." Assuming, although it is by no means clear, that the Court intended to lay down

(1) 14 Calc. W. R. Civ. Rul., 212. (2) I. L. R., 2 Bom., 19.
(3) 17 Calc. W. R. Civ. Rul., p. 70.

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that incorporeal rights were not included in the section, we are not disposed to follow that ruling. A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with its exercise is removed. The form of the order by which possession is restored, must depend upon the nature of the right and the circumstances of the case. Had it been the intention of the Legislature to exclude incorporeal rights, we might expect that it would have been done by express terms or by confining the operation of the section to "tangible immoveable property", as is done in section 145 of the Criminal Procedure Code of 1882. Upon the whole, therefore, we think that the Subordinate Judge did not act without jurisdiction.

As to the objection that the suit should have been instituted in accordance with the provisions of section 30 of the Civil Procedure Code, we think it is well-founded, as the right of fishery was claimed as one belonging to all the fishermen of the village of Naoghar; but we do not think that in a case like the present, where it is still open to the applicants to establish their right by suit, the irregularity was such as to call for the exercise of the powers of this Court, under section 622 of the Civil Procedure Code.

Lastly, the Court has decided, whether rightly or wrongly, that the plaintiffs had been in exclusive possession of the fishery within the limits claimed, and in so doing, acted within its powers.

We must, therefore, refuse the application with costs.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

MEHTÁ JETHA'LA'L, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAMIATRA'M LALUBHAI, (ORIGINAL DEFENDANT), RESPONDENT.*

1887 *September* 13.

Jurisdiction—Caste question—Secession from a caste—Property purchased by seceding section during period of secession—Reunion of section with the caste—Suit by caste to recover from a seceding member property purchased by seceding section.

The plaintiff and the defendant belonged to the caste of Visnagra Bráhmans, which in 1841 divided into two sections, known as the big and little sections.

* Second Appeal, No. 540 of 1885.

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While this division continued, *viz.*, in the year 1868, certain lands were purchased by the small section in the names of the plaintiff, the defendant, and three other persons. In 1873 the members of the small section, with the exception of the defendant, reunited with the other members of the caste. The lands, however, remained in the possession of the defendant. The plaintiff, on behalf of the caste, brought this suit to recover the lands from the defendant. Both the lower Courts held that the case was not cognizable by the Civil Courts, as it involved a caste question. On appeal by the plaintiff,

The High Court reversed the decrees of the Courts below, and sent back the case for retrial. The lands in question had been admittedly purchased out of their own funds and for their own purposes by the members of the caste who had seceded; and the question, as to whom those lands now belonged, being one between the caste and one of the seceding members who had purchased them, could not be a caste question, unless the small seceding section itself could be regarded (and it was not so contended) as a separate and distinct caste. Under these circumstances it was for the Civil Court alone to determine who was entitled to the property, although it might be incidentally necessary for that purpose to enquire into the usage and practice (if any) of caste sections, situated as the seceding section of this caste had been, with respect to the property in question. If the lands had been originally the property of the caste, the question would have been between the caste and a section of it, and would have been, as held *in Nemchand* v. *Savaichand* (1), a caste question, and not cognizable by the Civil Court.

THIS was a second appeal from a decision of A. Shewan, Assistant Judge of Ahmedabad.

The parties to the suit belonged to the caste of Visnagra Bráhmins. In 1841 the caste split up into two divisions, styled as the big and small divisions. In 1868, certain lands, the subject-matter in dispute, was purchased for and on behalf of the small division in the names of the plaintiff and four other members of the section, of whom the defendant was one. In 1873 all the members of the small division, except the defendant, became reunited with the other members of the caste. The lands in dispute, however, remained in the possession of the defendant.

The plaintiff now for and on behalf of the caste sued to recover possession of the lands. The defendant *(inter alia)* contended that the suit involved a caste question, and, as such, was not within the jurisdiction of the Civil Court.

Both the lower Courts dismissed the plaintiff's suit as a caste question.

(1) I. L. R., 1 Bom., note, p. 84.

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The plaintiff preferred a second appeal to the High Court.

Pándurang Balibhadra (*Ganpat Sadáshiv Ráv* with him), for the appellant:—The lower Courts were wrong in dismissing the plaintiff's suit. This suit does not involve a caste question. Here there will not be any interference with the autonomy of the caste. But the Court has to determine who is entitled to the possession of the caste property; and though it may be incidentally necessary to inquire into the usage of the caste, this circumstance alone cannot oust the jurisdiction of the Civil Court—*Prágji Kalan* v. *Govind Gopál*[1]; see also *Anandráv* v. *Shankar Dáji*[3]; *Krishnasami* v. *Krishnama Charyar*[2]; *Sudárám Patro* v. *Soodhá Rám*[4].

Goverdhanrám Mádhavrám, (*Nárayan Vishnu Gokhale* with him), for the respondent, contended that the question raised was a caste question.

SARGENT, C.J.—The question in this case arises out of a dispute in the caste of Visnagra Brahmins, and is the result of a division of that caste in 1841, into two sections, known as the big and little sections. During this division, *viz.*, in the year 1868, certain lands, which are the property in dispute, were purchased by the small section in the names of the plaintiff and four other persons, of whom defendant Jamiatrám was one, for and on behalf of the section. In 1873 the members of the small section, excepting the defendant Jamiatrám, became reunited with the other members of the caste. After 1873 the property remained in the possession of Jamiatrám, and the plaintiff now sues, for and on behalf of the caste, to recover possession of it. Both the lower Courts have decided, but we think wrongly, that the suit involved a caste question, and not cognizable by the Civil Courts.

If the lands in dispute had been originally the property of the caste, the question would have been between the caste and a section of it, and would be, as decided in *Nemchand* v. *Savaichand*[5], a caste question, and, therefore, not cognizable by the Civil Courts; but here the lands had been admittedly purchased by

(1) I. L. R., 11 Bom., 534.
(2) I. L. R., 7 Bom., at p. 328.
(3) I. L. R., 5 Mad., 313.
(4) 11 Calc. W. R. Civ. Rul., 457.
(5) I. L. R., 1 Bom., note to p. 84.

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the members who had seceded, and constituted the small section, out of their own funds and for their own purposes; and the question to whom those lands now belong, cannot be a caste question, unless indeed the small section itself could be regarded, and it has not been contended that it can, as a separate and district caste. Under these circumstances it is for the Civil Court alone to determine who is now entitled to the property in dispute, although it may be incidentally necessary for that purpose to inquire into the usage and practice, (if there be any), of caste sections, situated as the small section of this caste was, with respect to the property in question. We must, therefore, reverse the decree of the Court below, and send down the case for retrial. Costs of this appeal to abide the result.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *September* 22.

IN *RE* THE PETITION OF RÁDHI.

Married woman—Execution of decree—Liability of married woman—Arrest—Stridhan—Application for review of an order contrary to law—Waiver.

R., as surety for her husband, joined with him in executing a bond for Rs. 90. In a suit brought upon the bond, a decree was passed against both. R. was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency sections of the Civil Procedure Code (Act XIV of 1882), but not doing so she was committed to jail. Subsequently, however, she applied to be declared an insolvent, but her application was rejected. She then claimed to be released, on the ground of her coverture. The Judge rejected her application as being too late. On reference to the High Court,

Held, that her application for release was virtually an application for review of the order for her imprisonment, on the ground that it was contrary to law; that her mere omission to take the objection at the time of her arrest, could not be regarded as a waiver of her right of exemption from arrest; and, having regard to the nature of the right claimed, it was one which the Court could not properly decline to consider on review, however late the application might have been.

Held, also, that although the decree was absolute in its terms, and contained no express limitation of R.'s liability, nevertheless the law being clear that she could only be liable to the extent of her *stridhan*, it was to be assumed that the direction to pay, contained in the decree, had reference to that fund only.

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IN RE THE PETITION OF RÁDHI.

THIS was a reference by Ráv Bahádur K. C. Bedarkar, Acting Judge of the Court of Small Causes at Poona, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The applicant Rádhi and her husband were sued for Rs. 90 by a creditor of the husband on a bond dated the 15th September, 1884, which Rádhi executed as surety for her husband. The husband appeared, and admitted the claim. Rádhi did not appear. A decree was passed against them both.

In execution of this decree Rádhi was arrested. On being brought before the Court she was asked if she desired to apply to be declared an insolvent, under the provisions of the Civil Procedure Code. She did not then apply, and she was sent to jail. She subsequently, however, applied to be declared an insolvent, and prayed, at the same time, for an *interim* order of release. The latter prayer was refused on the 25th May, 1887, and her application was refused on the 3rd June, 1887.

On the 9th June, 1887, she applied to be released, on the ground of her coverture. The Judge of the Small Cause Court rejected her application, holding that it was too late. He referred the case to the High Court.

Vishnu Krishna Bhátvadekar for the applicant:—The Small Cause Court Judge was wrong in rejecting the application. The applicant was entitled to plead her coverture, and her omission to do so when she was arrested does not affect her right. She has no *stridhan*. If she had any, she would be liable only to that extent. See *Govindji Khimji* v. *Lakmidás Nathubhoy*[1]; *Narotam* v. *Nánka*[2].

Ganpat Sadáshiv Ráv for the creditor:—The applicant had an opportunity to set up the defence of coverture, but she waived it, and she cannot claim it now. The decree was against her and her husband in general terms, and it should be executed as it is. See *Shaik Budan* v. *Rámchandra*[3]. The execution proceedings came to an end when she was lodged in jail, and now the defence cannot be put forward.

(1) I. L. R., 4 Bom., 318. (2) I. L. R., 6 Bom., 478.
(3) I. L. R., 11 Bom., 587.

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SARGENT, C. J.—The application by Rádhi to be released from prison was virtually an application for review of the order for her imprisonment, on the ground that it was contrary to law. Two objections were taken to this application by the judgment-creditor. First, that Rádhi should have taken the objection when she was arrested and brought before the Judge, and that not having done so, it is now too late, but her mere omission to do so cannot, as it was contended by the opponent, be regarded as a waiver of her right of exemption from arrest; and, having regard to the nature of the right claimed, it was one which the Court could not properly decline to consider on review, however late the application might have been. Secondly, it was said that the decree was absolute in its terms, and contained no express limitation of her liability, and as she did not apply for a review, no other course was open to the Small Cause Court Judge in executing it but to enforce it in the ordinary manner The decree had been made in a suit on a bond in which she had joined with her husband as surety, and simply directed her to pay the debt. As the law is clear that in such a case Rádhi would only be liable to the extent of her *stridhan*—*Govindji Khimji* v *Lakmidás Nathubhoy*[1] and *Narotam* v. *Nánka*[2]—it must be assumed that the direction to pay had reference to that fund only. We think, therefore, that the Small Cause Court Judge was wrong in refusing the application.

(1) I. L. R., 4 Bom., 318 (2) I. L. R., 6 Bom., 473.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887 September 22.

KASTURCHAND GUJAR, PLAINTIFF, v. PARSHA MAHA'R, DEFENDANT *

Jurisdiction—Decree—Execution—British Courts in India, power of, to send their decrees for execution to Courts not in British India—Practice.

The Courts of British India have no authority to send their decrees for execution to Courts not in British India.

THIS was a reference by Ráv Sáheb Venkatrav R. Inámdár, Subordinate Judge of Bijápur, under section 617 of the Civil Procedure Code (Act XIV of 1882)

* Civil Reference, No. 37 of 1887.

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KASTURCHAD GUJAR v. PARSHA MAHÁR.

The question referred by the Subordinate Judge for the High Court's decision was:—

Has a Court in British India jurisdiction to transfer its decree to a foreign Court, or to a Court in a Native State, for execution by the latter?

The Subordinate Judge's opinion on the point was in the negative.

Chimanlál Hirálál for the plaintiff:—The decree can be sent for execution to the Court in a Native State. The term "Court" as used in section 223 of the Civil Procedure Code will include a foreign Court. In section 12 the word is qualified expressly by the addition of "foreign", and the intention of the Legislature may be gathered from this, that where "Court" is used alone it must include all Courts, and should not be confined to a Court in British India.

Motilál M. Munshi, for the defendant, contended that the British Courts cannot send their decrees for execution by Courts out of British India.

SARGENT, C. J.:—The Courts of British India have no authority to send their decrees for execution to Courts not in British India.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1887. *September* 22.

YASHVANT SHENVI AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VITHOBÁ SHETI, DECEASED, BY HIS MINOR SON, (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Mention in mortgage deed of another debt due to mortgagee distinct from sum advanced at date of mortgage—Clause in deed undertaking to pay off old debts when taking back the land—Old debt not a charge on land, but redemption conditional on payment of both debts—Execution—Claim to attached property—Order passed against claimant—Neglect of claimant to sue within a year after date of order—Civil Procedure Code (Act XIV of 1882), Secs. 278, 279, 280, and 283—Limitation Act XV of 1877, Sch. II, Art. 11.

* Second Appeal, No. 496 of 1885.

1887.

YASHVANT SHENVI v. VITHOBÁ SHETI.

V. mortgaged certain land to the defendant's father for a sum of Rs. 64 advanced by the latter at the date of the mortgage. The mortgage-deed stated that V. owed the mortgagee another debt of Rs. 100, which was due on a separate bond, and it contained a clause in the following terms :—

"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land * * * ". The plaintiff having obtained decree against the mortgagor attached the land in execution. The defendant, (son of the original mortgagor), thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. On the 9th March, 1881, the Court executing the plaintiff's decree made an order allowing the defendant's claim only to the extent of Rs. 64, and directed that the land should be sold subject to the defendant's lien for that sum. The plaintiffs bought the land at the execution sale, and offered the defendant Rs. 64 in redemption of his mortgage, which the defendant refused. The plaintiffs then brought the present suit to recover possession.

Held, that the charge on the land did not include the old debt of Rs. 100. There were no words in the mortgage-deed expressly making that debt a charge on the property. The provisions in the deed only made the equity of redemption conditional on the payment of both the debts.

Quære—whether, under the circumstances of the case, the purchaser at the execution sale would be bound by such a condition.

Held, also, that the object of the defendant's application in March, 1881, was virtually that the Court should allow his mortgage to the extent of Rs. 164, and the Court, having allowed his claim only to the amount of Rs. 64 by its order, *pro tanto* rejected his application. It was, therefore, an order passed against him, and having neglected to establish his right by suit within a year from the date of that order, he was now estopped from insisting on the condition—Civil Procedure Code (Act XIV of 1882), secs. 278, 279, 280 and 283; Limitation Act XV of 1877, Sch. II, art. 11.

SECOND appeal from a decision of A. H. Unwin, Acting District Judge of Kánara.

One Vithobá mortgaged to the father of the defendant the land, which was the subject-matter of the present suit, for the sum of Rs. 64, then actually borrowed. The mortgage-deed then executed contained a clause, which stated that there was another debt of Rs. 100 due by the mortgagor to the mortgagee upon a separate bond, and it gave an undertaking in the following terms :—

"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back

the land along with this document as well as that document. Till then you are to continue to enjoy the land * * * *".

The plaintiffs in the present suit were holders of a decree against the mortgagor, and in execution of that decree they attached the land in question. The defendant, (the son of the original mortgagee), by his mother and guardian thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. The Court executing the plaintiff's decree, however, on the 9th March, 1881, allowed his lien only to the extent of Rs. 64, and ordered the land to be sold, subject thereto. The sale took place, and the plaintiffs purchased the land. The plaintiffs then sought to redeem the defendant's mortgage, and offered him Rs. 64, which the defendant refused to accept.

The plaintiffs then brought the present suit against the defendant in 1883 to recover possession of the land. The defendant contended that the land was subject to the aggregate debt of Rs. 164, due on the two bonds.

The Court of first instance awarded the plaintiffs' claim, holding that the land was subject to the charge of Rs 64 only.

On appeal by the defendant, the District Judge reversed the lower Court's decree.

The plaintiffs preferred a second appeal to the High Court.

Náráyan Ganesh Chandávarkar for the appellants, (plaintiffs):—The mortgage was only for Rs. 64. The old debt of Rs. 100, due upon a separate bond, was not made a charge on this land. The mere mention, in the mortgage-deed, of this old debt did not make it a charge—*Náráyan* v. *Rávji*[1].

The defendant ought to have sued to establish his right after the order disallowing the rest of his claim under section 278 of the Civil Procedure Code (Act XIV of 1882) had been made on the 9th March. The defendant cannot now impeach that order, as more than one year has elapsed—*Rango Vithal* v. *Rikhivadds*[2].

Ghanashám Nilkanth Nádkarni for the respondent:—The mortgage-deed expressly made the whole sum of Rs. 164 a charge on the land. There was no claim made, under section 278

(1) Printed Judgments for 1884, p. 254. (2) 11 Bom. H. C. Rep., 174.

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of Act XIV of 1882, to raise the attachment. The defendant merely asserted his right as a mortgagee, in order to enable the Court to declare the land subject to the encumbrance as provided by section 287, and the property was sold subject to it. The purchaser at the execution sale bought only the right, title, and interest of the judgment-debtor. The time for payment of both the debts is the same.

SARGENT, C.J.:—We think that the Subordinate Judge was right in his construction of the mortgage-deed, (exhibit 29). There are no words in that instrument which expressly make the old debt of Rs. 100 a charge on the property. The mortgagor undertakes to pay it together with the Rs. 64 when he takes back the land, and also agrees to the mortgagee's continuing in the enjoyment of the land till he pays off both the debts; but these provisions are satisfied by construing them as intended to make the equity of redemption conditional on the payment of both the debts. This construction, moreover, receives corroboration from the allusion to the old debt as a distinct and separate transaction, which would have no significance if the intention was to make the Rs. 100 a charge equally with the Rs. 64. It is further to be observed that the entire income of the property had been previously appropriated in lieu of the interest on the debt of Rs. 64. But although the Rs. 100 was not, in our opinion, made a charge on the property, the equity of redemption was made conditional on the payment of the two debts; and we do not think that the remarks of the Court in *Ráma* v. *Mártand*[1] would be applicable to such a condition. The by-agreement in that case was in the most general and indefinite terms, and would necessarily have embarrassed the mortgagor in the exercise of the equity of redemption.

Whether the purchaser, under the special circumstances under which the property was put up for sale, would be bound by the above condition, it is not necessary to decide, as we are of opinion that the plaintiff is right in his contention that as the first defendant has not taken proceedings to establish his right within a year, notwithstanding the order made against him in March, 1881, in

(1) L. R., 9 Bom., p. 236, note.

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the summary proceedings, he is now estopped from insisting on the condition. It has been urged, indeed, on behalf of the defendant, that although his application was headed as made under section 278, the order which was passed on it was not one contemplated by sections 280 and 281. The application was, in terms, that "an order might be made that proceedings should go on keeping alive his lien" which he had previously stated in the application to be for Rs. 164. The Court by its order only gave effect to this application to the extent of Rs. 64. It thus appears that the object of the defendant, although not in terms, was virtually that the Court should allow only the equity of redemption on discharge of a mortgage for Rs. 164 to be attached and sold, and the Court by its order *pro tanto* rejected the application. It was, therefore, clearly an order passed against the defendant, and one which he could not say the Court had not jurisdiction to make. We may also remark that section 280 contemplates not only the entire release of the property from attachment, but also the retention of the attachment to such extent as the Court thinks fit. His right should, therefore, have been established by suit within a year. We must, therefore, reverse the decree of the Court below, and restore that of the Subordinate Judge. Costs on defendant throughout

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

BÁLA'JI LAKSHMAN, (PLAINTIFF), *v.* DÁDÁ JOTI, (DEFENDANT).*

1887. *November* 24.

Civil Procedure Code (Act XIV of 1882), Sec. 258—Decree—Satisfaction of decree out of Court—Payment uncertified—Suit to recover money paid in satisfaction of decree.

The plaintiff had been a surety for the defendant on a bond for Rs. 50 passed to G by the defendant. G. obtained a decree against the plaintiff on this bond, and the plaintiff satisfied the decree by paying G. Rs. 38 in full satisfaction. The payment was made out of Court, and was not certified to the Court. The plaintiff now sued the defendant to recover the money so paid by him to G. He called G. as a witness, who acknowledged he had received Rs. 38 from the plaintiff in full satisfaction of the decree.

* Civil Reference, No. 24 of 1887

1887.

BALÁJI LAKSHMAN v. DADA JOTI.

Held, that the last clause of section 258 of the Civil Procedure Code (Act XIV of 1882) did not apply to such a case, and that the payment made by the plaintiff to G, might be proved.

THIS was a reference by Rév Sáheb Dámodhar Kacheshwar Dhodapkar, Joint Subordinate Judge of Sholápur, under section 617 of the Civil Procedure Code (Act XIV of 1882). The reference was as follows:—

"The plaintiff Báláji Lakshman stood surety for the defendant Dádá under a bond for Rs. 50 passed by the latter to one Ganpatsing valad Gulábsing. Ganpatsing obtained a decree, No. 538 of 1886, upon this bond against the plaintiff Báláji in the Court of the First Class Subordinate Judge of Sholápur for Rs. 34-0-8 and costs in June, 1886. The plaintiff Báláji satisfied the decree by paying to the decree-holder Ganpatsing Rs. 38 in full satisfaction of the same. This payment was made out of Court, and was not certified to it by the decree-holder Ganpatsing. Ganpatsing, who had been called for the plaintiff in this case, acknowledged having received Rs. 38 from the plaintiff Báláji in full satisfaction of his decree."

The Subordinate Judge referred the following question to the High Court for its decision:—

Whether the prohibition against the recognition of an uncertified payment or adjustment, contained in the concluding para. of section 258 of the Civil Procedure Code, applies to this case?

The Subordinate Judge's opinion on the point was in the negative.

Shivrám Vithal Bhandárkar for the plaintiff:—Section 258 of the Civil Procedure Code (Act XIV of 1882) forbids recognition of any satisfaction of decree not certified between parties to the suit. The plaintiff was a surety for the defendant, and this suit is for money paid for the use of the defendant. No certificate is necessary: see *Pat Dási* v. *Sharup Chund* [1]. The decree-holder testifies to the payment, and his receipt, supported by his personal acknowledgment, can be proved "as a fact": see *Háji Abdul Rahiman* v. *Khojá Kháki Aruth*[2].

1) I. L. R., 14 Calc. 376. (2) I. L. R., 11 Bom. at p. 26.

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Goverdhanrám Mádhavrám, for the defendant, relied on *Háji Abdul Rahiman* v. *Khojá Kháki Aruth* (1), and contended that the payment could not be recognized.

NÁNÁBHÁI HARIDÁS, J. :—We are of opinion that the Subordinate Judge is right in holding that the last clause of section 258 of the Civil Procedure Code (Act XIV of 1882) does not apply to this case. The payment of Rs. 38 by Báláji to Ganpatsing can be proved as a fact by the evidence of Gantpatsing supported by his receipt (exhibit 3) for such payment. See *Háji Abdul Rahimán* v. *Khojá Kháki Aruth*(2). The Subordinate Judge to be informed accordingly.

(1) I. L. R., 11 Bom., at p. 26. (2) I. L. R.,11 Bom., pp. 13, 15, 19, 23, 36.

ADMIRALTY JURISDICTION.

Before Mr. Justice Farran.

1887.
February 1.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, (PLAINTIFFS), *v.* MESSRS. SHEPHERD AND HA'JI ISMA'IL HOSSEIN, (DEFENDANTS).*

Practice—Parties—Suit originally against owners—Amendment of plaint—Ship added as party defendant.

In a suit for collision originally filed against the owners of a ship,

Held, that the plaintiffs might amend the plaint by adding the ship as a party defendant.

APPLICATION in Chambers.—The plaintiffs sued the defendants to recover Rs. 50,000 as damages for loss sustained by them by reason of a collision which took place on the 18th December, 1886, between the plaintiffs' steam-ship "King Arthur" and the defendants' steam-ship "Zuari". The plaintiffs alleged that the collision was caused solely by the fault of the "Zuari" and those on board of her, and was not occasioned by the fault of the "King Arthur". The defendants' ship the "Zuari" was sunk by the collision. This suit was filed against her owners on the 21st December, 1886.

The "Zuari" was subsequently floated, and on the 25th January, 1887, the plaintiffs applied for leave to amend the plaint by adding the ship "Zuari" as a joint-defendant in the suit.

*Admiralty Suit, No. 7 of 1886.

1887.

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Chalk, for the defendants, objected:—The plaintiffs filed their suit three days after the collision, and elected to proceed *in personam* against the owners, and not against the ship. They now seek to change the nature of this suit by making it an action *in rem*. The written statement of the defendants has been prepared. The plaint cannot now be amended. He referred to Coote's Admiralty Practice, p. 23 (2nd ed.)

Inverarity, contra:—He cited *The Zephyr*(1).

1st February, 1887. FARRAN, J.:—This is an application to amend the proceedings by adding the steam-ship "Zuari" as an additional defendant. The defendants upon the record are her owners. I have already intimated my opinion that I ought to allow the amendment if I have power to do so. Should judgment be recovered by the plaintiffs, and should they fail to obtain satisfaction from the defendants personally, they would be entitled to take proceedings *in rem* against the ship to enforce their maritime lien—*The "Orient"*(2). Concurrent proceedings *in rem* and *in personam* could also be adopted by the plaintiffs: see *The Mali Ivo*(3), where the earlier authorities are referred to; but, if such proceedings were taken in different Courts, the Court, in which the later proceedings were taken, would have jurisdiction in its discretion to stay them until the termination of the earlier proceedings—*The Peshawur*(4). If the proceedings were taken in the same Court I presume that discretion would, as a rule, be exercised by amalgamating the two actions.

The foregoing remarks are made without reference to the provisions of the Civil Procedure Code. If without hardship upon the defendants the two proceedings can be included in the same action, it is obviously for the benefit of all parties that it should be done, rather than that the plaintiffs should be left to adopt separate proceedings. The plaintiffs did not, in the first instance, make the defendants' ship a defendant, (if I may use the expression), as she was then submerged in the harbour, which may be accepted as a fair reason for the course they have adopted.

(1) 11 Law Times, N. S., 351.
(2) L. R., 3 P. C., 696.
(3) L. R., 2 Ad. & E., p. 356.
(4) 8 Prob. Div., p. 32.

She has since been raised. The only suggested hardship occasioned to the defendants, which would not equally have been occasioned to them had the plaint been framed in the first instance in the manner now proposed, is that instructions for the drafting of a written statement have been prepared for counsel. It seems unlikely that these will require, except perhaps in the heading, any modification if the proposed amendment be allowed At any rate, the matter is too puerile to stand in the way of the Court making the order asked for, if for other reasons it be expedient to make it. It was argued that the plaintiff had deliberately elected his remedy, and that having done so, he should not be allowed to change his mind. The above quoted authorities show that the question of election does not arise, as the remedies *in rem* and *in personam* are cumulative.

The main argument of the solicitor for the defendants was, however, based upon a passage in Coote's Admiralty Practice (2nd ed.), p. 23; where citing *The Hope* [1] and *The Volant* [2], it is laid down that it is not competent for the Court to engraft proceedings *in personam* upon proceedings *in rem*. In those cases after judgment the proceeds of the vessel had proved insufficient to meet the damages awarded, and it was sought to supplement them by means of a motion against the master personally who had entered an appearance, and the Court held that the initial proceedings regulated the relief which it was competent for the Court to afford, and that the master's entering an appearance did not enlarge the scope of the proceedings *in rem* already adopted. A contrary decision had been arrived at in the case of *The Triune* [3]. The later decisions, however, afford no ground for the contention that at an early stage and in a proper case the initial proceedings cannot be amended so as to bring them into the form which they would have assumed in the first instance, but for the ship not being, or not being supposed to be, amenable to the process of the Court.

The objection, that the claim against the ship and the claim against the owners of the ship are of such a distinct nature and

(1) 1 W. Rob, p. 154; see p. 158. (2) 1 W. Rob 383.
(3) 3 Hag., p. 114.

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enforceable by such different processes that the one cannot be engrafted upon the other, applies equally to commencing a composite suit in which such claims are united, and to adding the one claim to the other by amendment after the suit has been initiated. In principle, I am unable to see any reason why they should not be united. It is much the same as suing upon the covenant in a mortgage, and to enforce a lien upon the mortgaged property in the same suit, though in form the mortgaged property is not made, as it were, a defendant.

Is such a proceeding allowable according to the practice and procedure of the High Court? I am not aware that it could have been resorted to in the Court of Admiralty in England prior to the Judicature Acts. No case has been brought to my notice in which this has been done; and Mr. Inverarity, who argued the case for the plaintiff, stated that, on looking through the forms adopted by that Court and the headings of a large number of cases reported from it, he could find no instance in which a ship and its owners or masters have been jointly sued. The practice in the High Court of Bombay has been different, at any rate of late years, and it is usual here to make the ship and her owners defendants in cases of damage arising out of a collision: see *The Augusta*[1]. In the cross suit brought by the defendants in the present case against the plaintiffs' vessel the plaintiffs, as her owners, have been made defendants jointly with their vessel, and that course is within my experience the usual one adopted. The question is, can it be sustained? If it can, principle and convenience alike, I think, demand its retention.

The rules regulating Admiralty practice provide that a suit shall be commenced by a plaint according to the provisions of the Code of Civil Procedure. They were framed when the Code of 1859 was in force, and when the power of the Court to regulate its procedure was more extended than it is at present. The rules subsequent to the one above referred to, provide for the taking out of a warrant of arrest when the suit is *in rem*, and make no special provision when the suit is *in personam*; but Rule 54 directs that proceedings not provided for by the rules

(1) 10 Bom. H. C. Rep., p. 110.

shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction. Though these rules do not apparently contemplate a suit *in rem* and *in personam* being combined, they do not expressly or by necessary implication forbid it. The Code of Civil Procedure of 1882 applies to proceedings on the Admiralty side of the High Court; section 645 A shows that this is so.

Section 28 provides that "all persons may be joined as defendants against whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." If the section applies in cases where a vessel is defendant, the question before me is solved. "Person" includes any company or association or body of individuals, whether incorporated or not: see Act I of 1868, sec. 2. Can it be held to apply to a vessel? I think it can. Section 48 provides that every suit shall be instituted by presenting a plaint. By section 50 the plaint must contain (*c*) the name and description of the defendant. Unless a vessel be included in the term "defendant" it follows that no suit in which relief is sought against a vessel can be instituted under the Code. I conclude, therefore, that the expression "defendant," used in section 28, includes a vessel, which for this purpose is invested with a *persona*, and I shall allow the amendment asked for. Adding a new defendant does not alter the cause of action, and the objection founded on section 53 is without foundation. The plaintiffs must bear their own costs of, and incidental to, the actual amendment and to the obtaining of an order for that purpose. The costs incurred by both parties in arguing the question of the power of the Court to amend, must be made costs in the cause.

Attorneys for the plaintiffs:—Messrs. *Winter and Burder.*

Attorneys for the defendants:—Messrs. *Chalk, Walker, and Smetham.*

ORIGINAL CIVIL.

Before Mr. Justice Farran.

1887. *September* 3.

DATUBHA'I EBRA'HIM, (PLAINTIFF), *v.* ABUBAKER MOLEDINA, (DEFENDANT).*

Damages—Agreement to lend money—Damages recoverable by lender for breach of such agreement—Contract Act IX of 1872, *Secs.* 73 *and* 74.

The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of Rs. 20,000 at 7½ *per cent. per annum* for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March, 1887, and that the plaintiff's attorneys had prepared the necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 *per cent. per annum*, and his *munim* took it to the attorneys' office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed, as damages, interest on the Rs. 20,000 at 1½ *per cent. per annum* for the three years for which under the agreement the loan was to be made.

Held, that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the Rs. 20,000 at the rate of interest agreed upon between him and the defendant. The Court accordingly awarded him interest at 1½ *per cent. per annum*, (*i.e.* the difference between the banker's rate of interest and the contract rate), on Rs. 20,000 for four months, together with the expense of preparing the deeds required for the purpose of the loan.

THE plaintiff, who was a money-lender, agreed to lend the defendant the sum of Rs. 20,000, at 7½ *per cent. per annum* interest for three years to be secured on certain landed property belonging to the defendant. The defendant failed to take the loan and carry out the agreement. The plaintiff brought this suit for specific performance of the agreement, or for damages.

The agreement sued on was dated the 22nd December, 1886, and was as follows:—

"To Khojá Datubhái Ebráhim.

"Written by Memon Abubaker Moledina.

"To wit: I have given in writing to you as follows:—As to my one house bearing No. 413, which is situated, &c. On (the

*Suit No. 184 of 1887.

security of) the said house I have this day agreed to borrow Rs. 20,000. The particulars thereof (are as mentioned) below. The arrangement (as) written below (is) agreed to.

"The amount, as mentioned above, is to be borrowed. The time for repayment is fixed at three years. If I should repay the amount within the three years, I am duly to pay interest for the year or years or months remaining unexpired.

"2. The interest on the above-mentioned amount is fixed at 10 annas *per cent. per mensem.* I am duly to pay the interest every three months.

"3. On having got a formal mortgage-deed prepared and registered, I am to receive the money at the time of its execution.

"4. I am to get for you insurance on the above-mentioned house effected for Rs. 20,000. I am duly to fix its period at three years.

"5. In respect of the above-mentioned mortgage, as to the aggregate costs of the mortgage-deed and registration, &c., which may be incurred, I am to pay the same. And I am duly to get the deed, &c., prepared through your solicitor. As to your solicitor's costs which may be incurred for preparing the deed of mortgage and for examining the vouchers, all those costs I am to pay. The vouchers show a good title to the property. Should there be any manner of objection in regard to those vouchers, I am to clear it all at my cost in such manner as your solicitor may desire.

"6. The above-mentioned agreement has this day been entered into through the broker Khán Mahammadbhái Dharmsi. I (*i. e.*, the broker) am not to charge any sort of brokerage to Datubhái. I (*i. e.* the broker) will charge brokerage to the mortgagee at the rate of 2 *per cent.*

"7. I am to borrow the above-mentioned amount within a period of two months from this day. Subsequently thereto should I make any manner of delay I am duly to pay interest on the above amount at the rate aforesaid from that date. The 22nd of December, 1886."

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At the time of the agreement the property of the defendant which by the agreement was to be mortgaged to the plaintiff as security, was mortgaged to one Háji Eliaz Ali, and the defendant caused the said mortgagee to produce the title-deeds of the said property in the office of the plaintiff's attorneys who prepared deeds of reconveyance and of mortgage for the purpose of carrying out the agreement. The expenses incurred were proved to amount to Rs. 200. The defendant, however, although called upon to execute the said deeds and to receive the money from the plaintiff, failed to do so. The plaintiff thereupon filed the suit, and prayed specific performance, or Rs. 4,700 damages.

The defendant admitted the agreement; and the only point raised at the hearing was as to the amount of damages. It appeared that the sum of Rs. 20,000, which the plaintiff proposed to lend to the defendant, had been lying at his banker's, who allowed him interest upon it at the rate of 6 *per cent. per annum*. It was withdrawn on the 1st March, 1887, which was the day fixed by the parties for the completion of the agreement, and was taken to the office of the plaintiff's attorneys, where the mortgage-deed was to be signed, for the purpose of being handed over to the defendant. The defendant, however, did not attend, and the money was returned to the plaintiff's bankers the next day, since which day it had remained there bearing interest at 6 *per cent.* as formerly. Evidence was also given as to the plaintiff's business, and it appeared that the loans made by him subsequently to the agreement were as follows, *viz.*, on the 8th April, 1887, a loan of Rs. 6,000 at 7½ *per cent.*; on the 20th July, 1887, a loan of Rs. 7,500 at 7½ *per cent.*; and on 2nd September, 1887, a loan of Rs. 20,000 at 8½ and 9 *per cent.*

Macpherson (Acting Advocate-General) and *Telang*, for the plaintiff, contended that he was entitled to 1½ *per cent.* interest on the Rs. 20,000 for the whole period of three years as damages. They cited Contract Act IX of 1872, secs. 73 and 74.

Lang and *Jardine*, for the defendant, contended that the plaintiff was not entitled to any damages. The money might have been lent next day to another borrower, and ought not to

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have been left at his bankers. They cited Coote on Mortgage, p. 211 (5th ed., 1884); *Holborrow* v. *Lloyd* [1]; *Duckworth* v. *Ewart*[2].

FARRAN, J.:—In this case there is really no dispute about the facts. The defendant in December of last year agreed to borrow from the plaintiff a sum of Rs. 20,000 for three years at 7½ *per cent. per annum*. The agreement was as follows :—(His Lordship read the agreement.) It is clear that the plaintiff cannot get specific performance of that agreement. The only question is with respect to damages Now, the effect of the first and last clauses of that agreement would seem to be that the defendant stipulates to pay interest on the whole amount if he does not borrow the money; that is, that, in the event of a breach of the agreement the amount thus ascertained is to be paid by him to the plaintiff. The case is, therefore, one to which section 74 of the Contract Act is to be applied. (His Lordship read the section.) By that section, then, the Court is bound to give to the plaintiff the damages which he can prove to have been sustained by him. I, therefore, have to inquire what damages have been really sustained by the plaintiff in this case; and the principles by which we are to be guided in ascertaining those damages are laid down in section 73 (His Lordship read the section).

Now, this is not the case of a breach of a contract of sale. The contract is one of loan, or for the hire of money; and the question is, what damages are recoverable if the loan is not taken up on a particular day? It appears that the parties agreed that the money should be advanced on the 1st March, 1887.

The land of the defendant, which was to be mortgaged as security to the plaintiff, was already in mortgage to another person. It was to be reconveyed by the mortgagee to the defendant and again mortgaged to the plaintiff, and for this purpose the necessary deeds were prepared by the plaintiff's attorneys, and were ready for execution on the 1st March, 1887. The plaintiff's *munim* attended on that day at the office of the plaintiff's attorneys with the Rs. 20,000 ready to be handed over to the defendant. That money had been withdrawn by the plaintiff

(1) 5 Jur. N. S., Pt. 2, p. 114. (2) 10 Jur. N. S., Pt. 1, p. 214.

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from his bankers, where it was bearing interest at 6 *per cent.* The defendant, however, did not attend to receive the money, and in fact the loan has never been advanced. The money was next day paid in again to the plaintiff's bankers, where it has ever since been bearing interest at the rate of 6 *per cent.*

Under these circumstances to what damages is the plaintiff entitled? He is clearly entitled to recover the expenses which he has incurred in preparing the necessary deeds. These expenses are proved to have amounted to Rs. 200. But he claims, in addition, one and a half *per cent. per annum* on the Rs. 20,000 for the period of three years for which the loan was to be made. That is the difference between the rate agreed upon in the contract and the rate which is allowed by his bankers, with whom the money lies deposited. I do not think he is entitled to interest for three years. I think he is only entitled to interest for the time required to find another borrower of his Rs. 20,000 at the same rate which the defendant agreed to pay. There is some difficulty, of course, in fixing the time necessary for this. It must be to a certain extent a matter of conjecture. The amount to be lent must be taken into consideration; for it is clear that the larger the sum offered, the longer the time that would be required to find a borrower. It would, no doubt, be easier to find a borrower of Rs. 20,000 than to find a borrower of two lákhs. The plaintiff appears to have lent Rs. 6,000 in April, Rs. 7,500 in July, and Rs. 20,000 yesterday. I think four months in this case would be a reasonable time. I have no doubt that the plaintiff with the assistance of a broker could within that period have found a person willing to take his Rs. 20,000 on loan at 7½ *per cent.* interest. I think that, under section 74 of the Contract Act, I have a discretion in awarding damages, and I accordingly award him Rs. 100, which is 1½ *per cent.* on Rs. 20,000 for four months, together with the sum of Rs. 200, which is the amount of expenses which he has incurred.

Attorneys for the plaintiff:—Messrs. *Thákurdás and Dharamsi.*

Attorneys for the defendant:—Messrs. *Bomanji and Hormasji.*

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

MANOHAR GANESH TA'MBEKAR AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKHMIRA'M GOVINDRA'M AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.* 1887. *May* 3.

Charity—Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account—Jurisdiction of Civil Courts in cases relating to public charities—Right to sue—Civil Procedure Code (Act X of 1877), Sec. 539—"Direct interest", meaning of—Practice—Application to put in evidence in appeal which applicant refused to produce at first hearing.

1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes", within the meaning of section 539 of the Code of Civil Procedure (Act X of 1877).

2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious, or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law.

3. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for mal-administration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*.

The plaintiffs, as relators, filed this suit, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Rá'ji at Dákor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dákor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *shevaks* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. They remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhanddr* or store-room.

The god Shri Ranchhod Rá'ji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity, of cash, ornaments, clothes, and other articles, amounting in value to about a lákh of rupees

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in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *inám* villages, of which Dákor and Kanjri yielded the largest income.

The plaintiffs sued as persons interested in the maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income of the temple had largely increased, and had been wrongly appropriated by the defendants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management.

The defendants answered *(inter alia)* that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under section 539 of Act X of 1877; that they themselves were owners of the idol and of the idol's property, and that, as such, they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past.

The District Judge dismissed the suit, on the preliminary ground that, except the first plaintiff, who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

Held, reversing the decision of the District Judge, that plaintiffs Nos. 2—5, as priests residing at Dákor and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees, they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance.

Held, further, that the *shevaks* were not the owners of the offerings made to the idol. As recipients of those offerings, they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management.

The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it.

The jurisdiction of the Civil Courts in matters of this kind discussed.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be

produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce.

Held, that the evidence could not be admitted.

APPEAL from the decision of S. H. Phillpots, District Judge of Ahmedabad, in Suit No. 23 of 1880.

This was a suit filed with the consent of the Advocate-General, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Ráiji at Dákor.

The plaintiffs were five in number; of these the first plaintiff, Manohar Ganesh Támbekar, was the hereditary manager of the temple. The other plaintiffs were the *gors*, or priests, residing at Dákor, whose duty was to conduct the pilgrims, who were their *yajmáns*, or patrons, to the shrine, and perform the worship of the idol on their behalf.

The defendants were a numerous body, (about one hundred and fifty in number), of *shevaks*, or ministers of the idol, succeeding to their offices by hereditary descent; they remained in constant attendance on the idol, performed the daily services, and kept in their custody all the cash, ornaments, clothes, and other offerings dedicated to the deity. They were paid Rs. 150 a year out of the revenues of the foundation.

Evidence was given that the god Shri Ranchhod Ráiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of votaries visited the shrine and made offerings of cash, clothes, ornaments, and other moveable as well as immoveable property, amounting in value, in the course of a year, to about a lákh of rupees.

The temple enjoyed, in perpetuity, the revenues of several villages, of which the principal were Dákor and Kanjri, granted in *inám* by native princes and chiefs for the support of an institution which had been in existence for nearly seven hundred years. The idol's throne has lately been covered with gold and silver by His Highness the Gáekwár at a cost of Rs. 1,25,000.

The present temple was built in 1772 A. D. by Gopál Jagannáth Támbekar, ancestor of the first plaintiff, at a cost Rs. 1,00,000.

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Ever since that date the management of the temple and its appendant villages had been carried on by the Támbekar family. In the same year in which the temple was built, the whole body of *shevaks* passed an agreement, in writing, to the manager of the institution, by which they bound themselves to observe certain rules in the performance of the daily services at the temple, and for the preservation of the offerings made to the idol. This agreement (exhibit 4) runs as follows :—

"*Let Shri Ranchhod Ráiji be propitious.*

"To

"Shrimant Rájeshri Gopál Nark Támbekar, written by *shevak* Najirám Jádurám and Aditrám Vanchidás and Bhuldás Manoredás and Purbhudás Mánockji and Velji Rangji and Kalyán Náthji, and the whole body of *shevaks* (officiating priests) of Máiji Dákorji—to wit: for the purpose of the worship and adoration in the temple of Shri Ranchhod Ráiji we, the whole body of the *shevaks*, do hereby with our own will and pleasure give in writing that in the temple of the *shriji* (deity) we shall enter after bathing and purifying ourselves, and any *yajmán*, or patron, whom we may bring in for offering worship will also conform to the same restrictions; we are never to enter the temple, even for a moment, with uncleanliness or without bathing, nor are we to take the *yajmán* in that condition. And there are three classes among us, namely, the *shrigods*, *kherawals*, and *tapodhans*. Of these three classes each man is to remain in attendance whenever his turn comes on; the *tapodhans* are to enter the temple taking the key and to take the stand there; while the Bráhmins of each of the two divisions, one of each, *i.e.*, two at a time, are to do worship and service of the deity, and at the end of eight days the money, presents, and offerings that might have been collected, will be accounted for by those in whose turns they were respectively received, and under no inducement are to misappropriate or steal out of them, and will not permit any violation in the worship and service on any account, and if we do so we are guilty of Shri Ranchhod Ráiji, and offenders against the law of the Government. 2ndly. In the cooking of the sacred food for the deity, three persons of the three divisions are to remain

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there, and not a fourth person can be tolerated there, and if we make any sort of confusion in respect of cooking the victuals, we are offenders against the law of the Government.

"In this manner we *shevaks*, having assembled in a body, have agreed [to the above] of our own pleasure; we and our sons are to observe and conform to this from generation to generation. For all these promises the *shriji* (God) is the guarantee. This agreement will be carried out in the spirit of the word of our father.—Dated and written on Monday, *Chaitra Shud*, 3rd, *Samvat*, 1828" (A.D. 1772).

* * * * * *

"What is written above is true and binding.

"As to the dresses and jewels of Shri Ranchhod Ráiji, we are not free to sell in any way. Thirdly. In the village of Dákor, if any Bráhmins or Shudras or Jamádárs or any person of the whole village or some one of the outside visitors are found to misbehave, or to act in an improper manner, we are never to espouse his or their cause. You can get the punishment he or they deserved, inflicted by the Government. We are not to take their side, and if we should do so, we will be guilty before God (Ranchhodji) or before the ruling power. Again, if any one out of the body of our *shevaks* were found to offend in any way, then, too, we are not to join together or make any quarrel; if we do, we are guilty before God, and offenders against the ruling powers."

The plaint alleged that the defendants had frequently acted in contravention of the rules laid down in the aforesaid document, that they had latterly set up a proprietary title to the offerings made at the shrine, that they had appropriated part of those offerings to their own use, and that they refused to render an account of the property held by them in trust for the idol.

The plaintiffs, therefore, prayed as follows:—

1. That an account might be taken, by and under the directions of the Court, of all sums of money, ornaments, cattle, and all other moveable and immoveable property which had come into the hands of the defendants as trustees of the idol.

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2. That the defendants might be ordered to pay into Court whatever on taking accounts might be found due by them to the funds of the temple.

3. That, if necessary, the defendants might be removed from their office of *shevaks*, or worshippers, and new *shevaks*, or worshippers, be appointed in their stead.

4. That a scheme might be settled by, and under the directions of the Court, for the management of the temple and of the funds thereof.

5. That an injunction might be issued restraining the defendants from removing, alienating, or otherwise disposing of the cash, clothes, ornaments, and other moveable as well as immoveable property dedicated to Shri Ranchhod Ráiji.

6. That a receiver might be appointed to take charge of the said property of the idol.

7. That all books, papers, and documents relating to the said offerings and to the disposal thereof might be directed to be forthwith brought into the custody of the Court.

In their written statement the defendants replied *(inter alia)*, that the plaint was not sufficiently stamped; that the plaintiffs had not such direct interest in the temple, or in the property appurtenant to the temple, as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877); that the suit was barred by limitation; that the *shevaks* were not the servants of the temple, but owners of the idol and its property; that as owners and proprietors they and their predecessors had carried on the management of the temple uninterruptedly for more than seven hundred years; that they had never rendered any account of their management to the plaintiff Manohar or his ancestors, or to any other person; that the agreement of A.D. 1772 was not a genuine document, and even if its genuineness were established, it was not binding on them; that they had appropriated to their use such offerings as it had been their practice to appropriate for hundreds of years past; that they were not trustees of the *devasthán*: that they had not abused any trust, and were not liable to be removed from their office and position as *shevaks*; and that

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the plaintiffs had no right to demand an account of their management.

As to the first objection, that the plaint was not sufficiently stamped, the District Judge held, following the decision of the High Court at a former stage of this case[1], that the plaintiffs were at liberty to fix what sum they pleased, which they had apparently fixed at Rs. 130, but as they alleged three distinct causes of action, and sought three distinct remedies, they were ordered to pay Rs 10 for each relief sought.

The District Judge, however, dismissed the suit, on the preliminary ground that the plaintiffs Nos 2—5 had not any direct interest in the trust in question so as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

With regard to this section he observed as follows:—"There must be two persons having a direct interest in the trust. It is clear that the first plaintiff has such an interest. In exhibit 300 he is styled manager and hereditary patron of the temple, and as the descendant of the builder of the temple in which the idol now is, and as the hereditary manager of the estates belonging to it, and as the supplier from those estates of money and other things for the use of the temple, he has an undoubted direct interest in the trust, but, as regards the other plaintiffs, the case is very different. They allege in their plaint that they are trustees of the temple, but that is manifestly false, they are only *gors*, or *upádias*, whose duty it is to conduct their clients to worship, to perform certain ceremonies there, and to receive what their clients give them. The only interest they have in the temple is that they get certain sums deposited by their clients before the god, and the only interest they profess to have in the trust is to see that the ornaments and clothes presented by their clients are put on the god at certain times, but this does not make them trustees of the temple. Any Bráhmin can be a *gor* if he can only get clients to employ him. The second and fifth plaintiffs have just as much interest in the temple as other Vaishnavas, and no more. It is true a good deal of their income depends on the

(1) *Vide* Printed Judgments for 1877, p. 244.

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prosperity of the temple and the repute in which the idol is held, but that pecuniary interest is shared by the lodging house-keepers and shop-keepers of Dákor; and if being interested in the prosperity of the temple made a person a trustee, then the B. B. & C. I. Railway, which gets more money in the year than probably the whole body of *gors* put together, should be a trustee of the temple. *Dhadphale* v. *Gurav*[1] shows that the mere fact, that plaintiff has sustained some pecuniary loss from the non-performance of the service of the temple, does not give him a cause of action. And as the Advocate-General's sanction is necessary for a suit of this kind, it is necessary for the plaintiffs to prove the cause of action on which they got that sanction.

"In the plaint, which was sanctioned by the Advocate-General, the plaintiffs Nos. 2, 3, 4, 5 are thus described—'residents of the village of Dákor and trustees of the temple.' It cannot for a moment be argued that every resident of Dákor has a direct interest in the trust, and that the plaintiffs Nos. 2, 3, 4, 5 are trustees of the temple is, as I have above shown, distinctly false."

Against this decision the plaintiffs appealed to the High Court.

Telang (with him *Shántárám Náráyan*) for the appellants.

Macpherson (Acting Advocate General) (with him *Rév Sáheb Vásudev J. Kirtikar* and *Gokuldás Kahándás Parek*) for the respondents.

Macpherson:—The Court below has disposed of the suit on a preliminary point. It has not recorded its findings on the principal issues. We desire to put in further evidence, consisting principally of our books of account. These books are necessary to establish our case.

Telang:—Even if the books be material, it is too late to put them in. The defendants refused to put them in in the lower Court, and successfully resisted our application for their production.

[WEST, J.:—We think the proposed further evidence should not be admitted.]

Telang:—The plaintiffs on behalf of the persons interested in this religious and charitable institution at Dákor claim an

(1) I. L. R., 6 Bom., 122.

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account from the defendants, who are the hereditary *shevaks*, or ministers of worship at the temple. The defendants collect the offerings made to the idol, and keep them in a *bhandár* or store-house. The property in their hands belongs, not to themselves, but to the idol. It is the subject of a religious and charitable trust. *Shevaks* are the trustees. As such they cannot appropriate the offerings to their own use. They have bound themselves by exhibit 4, a document passed so far back as A.D 1772, to preserve the offerings for the use and benefit of the idol. The original of exhibit 4 was produced in a previous litigation between the parties. In execution of a decree against the ancestor of the first plaintiff, two villages belonging to the temple were attached. The *shevaks* sought to raise the attachment, on that occasion the attaching creditor used the original against the *shevaks*, and the attachment was upheld. A certified copy of the original was then filed in a subsequent litigation between the Támbekars and the *shevaks*. The *shevaks* of the present day represent, as a class, the whole body of *shevaks* who had originally passed the document, and against whom it had been used in former litigation. The document is, therefore, binding on them—*Jenkins* v. *Robertson*,(1) and *Anandráo Bhikáji Phadke* v. *Shanker Dáji Chárya*(2). Under this document the *shevaks* admit their responsibility as trustees holding the offerings for the use and benefit of the deity. In the face of this document it is not open to the *shevaks* to contend that they are owners of the idol and of the idol's property. The idea of ownership set up by the defendants is a wholly novel idea, irreconcileable with the central theory of Hindu law, which regards an idol as a juridical person capable of holding property, and possessing rights which require special protection at the hands of the Sovereign—West and Buhler, (3rd ed.), pp. 185, 201, 203. In *Rupá Jupshet* v. *Krishnáji Govind*(3) it was held that lands granted for the purpose of keeping up the worship of a household idol constituted a religious endowment, and were, therefore, not liable to attachment or sale in execution of a decree against the grantee. The grantee was a

(1) L. R. 1 Ap. Ca. (Sc.), 117. (2) I. L. R., 7 Bom., 323.
(3) I. L. R., 9 Bom., 199.

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trustee and not an owner of the dedicated lands. So, too, the *shevaks* must be held to be trustees, and not owners, of the offerings dedicated to the god Shri Ranchhod Rájji. The temple is a public temple, to which large numbers of Vaishnavas resort every full moon, and make valuable offerings to the deity. The evidence shows that the ruling authorities have interfered from time to time to guard these offerings against waste and misappropriation. The oral evidence shows that the devotees make offerings for the benefit of the idol, and not of the *shevaks*. The *shevaks* themselves admitted through their pleader in exhibit 242 that they used to divide only small coins offered at the shrine, whilst the rest was reserved for the exclusive use of the deity. In exhibit 264, which is an application made by the *shevaks* to Government for exempting the income of the temple in their hands from the income-tax, they distinctly admit that they divide only the little surplus that remains after providing for the daily worship and ceremonies at the temple. The *status* of the *shevaks* has been already determined and adjudicated upon in former suits between the parties. In S. A. No. 448 of 1870—*Ganpatráv Manohar* v. *Rámádhindás Vimaldas*[1]—it is held that the *shevaks* are not the owners or even managers of the temple, but mere votaries or worshippers of the idol. And this decision is followed in S. A. 245 of 1871—*Gunpatráo Manohar* v. *Anoprám Bechar*[2]. As votaries, the *shevaks* have no beneficial interest whatsoever in the offerings made to the deity. They are bound to account for all the property they hold in trust for the idol.

Macpherson:—In the previous suits the question as to the ownership of the offerings made at the shrine was not raised or decided. The decisions in those suits have, therefore, no bearing on the points at issue in the present case. We say that the offerings are entirely distinct from the temple and its appendant villages. The offerings at first were not so large as at present. The first object was to provide for the maintenance of the ministers at the shrine. As costly presents came in, the practice arose of storing them for the idol. But this was a

(1) Printed Judgments for 1874, p. 258.

(2) Printed Judgments for 1879, p. 301.

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practice of an optional character, or merely a moral obligation. The *shevaks* from time to time distributed the gifts among themselves under no limitation except that of prudence and a sense of propriety. The ancestors of the *shevaks* have established the worship and distributed the income among themselves. Exhibit 4 is not proved. Nobody has seen the original, or accounts for its loss. It is not to be found on the record of the case to which reference is made. Nor has it ever been acted upon. It was not produced in the suit of 1834, which we filed against the first plaintiff's ancestor. The documents referred to by the other side merely show that the executive authorities sometimes interfered to prevent disorder or a breach of the peace in the temple. Our witnesses say that the *shevaks* are entitled to take the offerings as representatives of the idol. The donors say that the *shevaks* are the owners of the offerings. The practice at this temple also establishes their right to take the offerings. This practice should be recognized and acted upon. Refers to *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*[1], and West and Bühler (3rd ed.), p. 201.

WEST, J.:—At an early stage of the hearing of the present case we ruled that the defendants, the *shevaks* of the temple at Dákor, could not be allowed now to put in as evidence the account books which they had in the Court of first instance refused to produce. After succeeding in his resistance to the production of documents, a party cannot be allowed, when the hearing has been finished and when his adversary has perhaps been driven to establishing his case on a quite different footing, to turn round and request that the document may be admitted. The precedents cited do not warrant such an indulgence, and it would certainly tend to the encouragement of chicanery and the defeat of justice.

The plaintiffs come forward in the present case in the character of relators as persons interested in the religious foundation of the temple of Dákor dedicated to the deity called Shri Ranchhod Rájji. As persons interested in the maintenance of the institution and the due celebration of the worship, they pray

(1) L. R., 4 I. A., 76.

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that the Court will make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The income of the temple having, as they say, largely increased, and being wrongly or unduly appropriated by the defendants, called generally the *shevaks* (or ministers), to their personal purposes, they pray for the appointment of a receiver for the exaction from the defendants of accounts of their management, for the delivery up by them of all property appertaining to the temple, for an inquiry into their conduct as ministers of the idol, and for the construction of a scheme of future management.

The defendants take the position that they, as a body, are the owners, for all secular purposes, of the idol, whom, in the spiritual sense, they serve. The offerings made at the shrine, the cattle, and even the land presented by devotees are, they assert, their property free from any secular obligation, as none has ever in practice or in the intention of the donors been annexed to the gifts by which religious merit was sought and gained. They hold the property thus acquired, and have for centuries held it, as a sort of sacred guild, with hereditary succession to the several members. It is not held on any trust for the support of ceremonies or with any obligation annexed to it that can be enforced in a secular Court. The duty of providing a regular worship for the deity is of a purely moral kind, which they discharge merely to satisfy their consciences, one the nature and limits of which have never been settled otherwise than by their own will and judgment.

The District Judge rejected the suit, on the ground that the plaintiffs, other than Manohar Ganesh Támbekar, had not the position which they claimed of joint trustees of the temple. They were not, he found, even directly interested in the institution. The plaintiff Manohar was interested, but then he sued merely out of spite at a decree having been passed against him in favour of the *shevaks*, the present defendants.

It has not been contended before us that, if the property in question is a trust at all, the plaintiffs have not such an interest in its right administration as enables them to fill the part of relators.

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As to Manohar, the District Judge recognized his capacity, and the motives that actuated him do not affect his capacity. The other plaintiffs are priests who take part in the ceremonies in so far that they take charge of votaries, conduct them through the solemnities, and receive certain offerings with which to a larger or smaller amount the pilgrims must requite their services. Taking part in the worship they are directly interested in its due performance and its maintenance. They may not be trustees, but they clearly are amongst those who in practice benefit by the execution of the trust, supposing there is a trust. They have thus an undeniable *locus standi* as relators, and the suit, if maintainable, may proceed at their instance.

There is no difficulty in conceiving the existence of a society having property and receiving gifts from its own members or from strangers, which it then disposes of simply for its own benefit or at its own discretion. The guilds and companies in manufacturing and trading cities held and still hold estates without the attendant obligations of a charitable trust. The property is their own, distributable amongst the members or at the pleasure of the governing body of the society, not held for the benefit of any class outside the society or for the promotion of any purpose of recognized public utility. The latter characteristic is essential to a public charity, but in its absence there may be a corporation existing by royal grant, prescription or legal allowance, holding property for other than charitable purposes. Whether the association exists for charitable purposes or not, it cannot, according to the English law, without incorporation in some shape, become vested with property as a mere fluctuating and undefined aggregate—*Goodman* v. *Mayor of Saltash*[1]. If its purposes are such as are contemplated by section 26 of the Indian Joint Stock Companies' Act, VI of 1882, the society may get itself constituted accordingly under the Act. Otherwise, though the individual members may have certain rights and privileges as members of a class or answering to a certain designation, these advantages must be realized, as against the world at large, through the proprietary or *quasi*-proprietary right of some other person or corporation.

(1) L. R., 7 Ap. Cas. 633 at p. 648.

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The defendants in the present case put themselves forward, not merely as entitled to the enjoyment of particular benefits to be taken by them individually as members of a class, but as a body of proprietors holding a small estate in the shape of immoveable property, but a much larger one in the form of the accumulated offerings of articles of value laid at the feet of the idol and of the revenue arising from this source. The questions are whether they can and do take this property and this revenue absolutely as their own without any trust or annexed duty, and whether, if they enjoy by a kind of agency or representation of the idol conceived as a personality, they fulfil the duty they owe to this ideal person in merely revelling on the growing revenues, or are bound to widen the range of the deity's beneficence in proportion to the expansion of his mundane means.

As to the jurisdiction of the Civil Courts in matters of this kind, it is too late now to raise any contention. Under the native system of government though it was looked on as a heinous offence to appropriate to secular purposes the estate that had once been dedicated to pious uses, (W. & B., H. L., 202, 817), yet the State in its secular executive and judicial capacity habitually intervened to prevent fraud and waste in dealing with religious endowments. It was quite in accordance with the legal consciousness of the people that the Bombay Regulation XVII of 1827 gave to the Collector a visitatorial power enabling him to enforce an honest and proper administration of religious endowments. The connexion of the Government in its executive capacity with Hindu and Mahomedan foundations was brought to an end for Bombay by Bombay Act VII of 1863 and for Bengal and Madras by Act XX of 1863. But the existence of sacred property and of the rights and obligations connected with it as objects of the jurisdiction of the Civil Courts is recognized by the laws just referred to. In the southern part of the Bombay Presidency, dedicated estates are expressly made inalienable by Bombay Act II of 1863, sec. 8. Questions arising under these laws between individuals with reference to proprietary and pecuniary rights and as to alleged misappropriations and defalcations must necessarily be dealt with by

the Civil Courts, which only can bring the requisite sanctions to bear on the enforcement of an honest discharge of their duty by the holders of dedicated estates. The more incidental cognizance of a religious or caste question, the recognition of the settlement of such a question by the competent authority, is involved in the exercise of this jurisdiction, and does not stand in the way of it—*Krishnasami Chetti* v. *Virasami Chetti*(1). It is recognized by the indigenous customary law that an affair, in which the castes could not or would not give relief, is a proper subject of adjudication by the ordinary Civil Courts(2). The cases in which Hindu foundations and charitable (including religious) trusts have been enforced and the persons connected with them made accountable by the Civil Courts are too numerous to mention. Reference may be made to *Mahâranee Shibessource Debia* v. *Mothooranath Acharjo*(3); *Mohunt Burm Suroop Dass* v. *Khashee Jhâ*(4); *Juggodumba Dossee* v. *Puddomoney Dossee*(5); *Dhurrum Singh* v. *Kissen Singh*(6). If, then, there is, in the present case, a public purpose, for the fulfilment of which, a class of persons, for whose benefit, in a way admitted by the State as deserving protection, the property of the Dákor temple is held and its revenues are received by the defendants, the defendants become by these mere circumstances amenable to the jurisdiction we are now called on to exercise. The religion of the Hindu population being jurally allowed, the duties and services connected with it must be deemed objects of public concern, and at least as to their physical and secular elements, enforceable like other obligations.

The evidence recorded in the case, including that of many donors to the idol Shri Ranchhod Râiji, shows that having discharged a religious duty or gained religious merit by a gift to the deity, the votary is but little interested in what afterwards becomes of the offering(7). Still he must needs be and is concerned in the maintenance of a decent and orderly worship. He

(1) I. L. R., 10 Mad., 133, 144; W. & B., H. L., 599 n.

(2) West and Bühler, H. L., p. 1007 n (o); Steele L. C., 185, 186 and 267.

(3) 13 Moore's I. A., 270.

(4) 20 Calc. W. R. Civ. Rul., 471.

(5) 15 Beng. L. R., 318.

(6) I. L. R., 7 Calc., 767.

(7) West and Bühler, H. L., pp. 197, 411; Vya. May. Ch. IV, s. 1, pa. 8.

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is interested, too, in the honour and respect of the deity he reveres. He does not intend to pander to unrestricted licentiousness or mere ignorant sensuality which must bring his deity and its worship into contempt. He desires a regular and continuous or at least a periodical round of sacred ceremonies, which might fail if the offerings of past years were all squandered, while those of any given year fell short. The *shevaks* seem to have received the offerings, both of immoveables and of moveables, with a consciousness, though but a hazy consciousness, that they were bound, out of the funds thus coming to them, to provide for the worship of the idol and the convenience of the pilgrims who resort to the temple In the document No. 4, dated in 1772, the *shevaks* admit their responsibility to the then manager of the villages with which the temple had been endowed. The document No. 4 is a copy agreeing with an earlier copy of the original which has been taken from our records for comparison. It was filed nearly half a century ago in the course of execution proceedings against the temple property by the judgment-creditor; and though the original has disappeared, there seem to be reasonable, though not perhaps conclusive, grounds in favour of the genuineness of the copy filed in 1831, and then admitted as evidence. As the admission of the copy was not, so far as appears, resisted, we may properly act on it as evidence. The *shevaks* of to-day, who claim by a continuity of rights as the representatives of the *shevaks* for several centuries back, must submit to a like succession of responsibility, and thus the document, exhibit 4, is evidence against them, as though it were of but recent date

The document, (exhibit 210), dated in 1793, shows the native governor of the fort of Pávghar exercising a visitatorial power to prevent waste of the temple property by either the Támbekar managing the dedicated villages, or the *shevaks* holding the accumulated offerings at the shrine. In 1818, exhibits 243, 256 are orders of the English Collector exercising an authority like that formerly exercised by the native governor. The *shevaks* are allowed to take the offerings in cash, but articles of value, such as clothes and jewels, are to be consigned to the charge of the *bhandári* or store-keeper. Again in 1829 (exhibit 322) and in

1831 (exhibit 244) the Collector intervened to preserve order and to prevent mismanagement, with a threat that neglect would be followed by an adoption of the measures authorized by Regulation XVII of 1827. Coming down to a more recent time, we find the *shevaks* in 1861 (exhibit 264) petitioning the Government of Bombay for a remission of income-tax, on the ground that the revenue derived from the offerings was primarily the property of the idol. An idol, the *shevaks* contend, is not subject to taxation. The necessities of the ceremonial worship had first to be provided for, and only the surplus was distributed amongst the *shevaks*. Again, in 1878, the pleader of the *shevaks*, instructed to answer for them in the previous suit, stated distinctly that the claims of the idol,—that is, debts incurred on behalf of the idol,—must be satisfied before claims of the *shevaks*. Clothes and valuables presented by votaries were, he said, presented for the idol; but small coins were distributed amongst the *shevaks*, about one hundred and fifty in number. Some months afterwards, it is true, the *shevaks* sought to withdraw these admissions and set up an absolute proprietary right to all that had been offered or dedicated to the idol, but the motive of this contradiction is evident, while the prior deliberate statement derives force from its conformity with the previous history of the institution and with the religious system of the Hindus.

The Hindu law, like the Roman law and those derived from it, recognizes, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations[1]. A Hindu, who wishes to establish a religious or charitable institution, may, according to his law, express his purpose and endow it[2], and the ruler will give effect to the bounty, or at least protect it, so far, at any rate, as it is consistent with his own *dharma* or conceptions of morality[3]. A trust is not required for this purpose: the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English law[4]. In early

(1) West and Bühler, H. L., 201, 185, 553, 555.

(2) West and Bühler, H. L., 99, 197, 216.

(3) West and Bühler, H. L., 33; Manu VIII, 41; Coleb. Dig., B. III, Ch. II, T. 28.

(4) Spence Eq. Juris., 440; Sav. Syst., s. 88.

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times a gift placed, as it was expressed, "on the altar of God" sufficed to convey to the church the lands thus dedicated[1]. Under the Roman law of pre-Christian ages such dedications were allowed only to specified national deities[2]. After Christianity had become the religion of the empire, dedications to particular churches or for the foundation of churches and of religious and charitable institutions were much encouraged[3]. The officials of the church were empowered specially to watch over the administration of the funds and estates thus dedicated to pious uses[4], but the immediate beneficiary was conceived as a personified realization of the church hospital or fund for ransoming prisoners from captivity[5]. Such a practical realism is not confined to the sphere of law; it is made use of even by merchants in their accounts, and by furnishing an ideal centre for an institution to which the necessary human attributes are ascribed—*Dhadphale* v. *Gurav*[6]—it makes the application of the ordinary rules of law easy as in the case of an infant or a lunatic[7]. Property dedicated to a pious purpose is, by the Hindu as by the Roman law, placed *extra commercium*[8], with similar practical savings as to sales of superfluous articles for the payment of debts and plainly necessary purposes[9]. Mr. Macpherson admitted for the defendants in this case that they could not sell the lands bestowed on the idol Shri Ranchhod Rájji. This restriction is like the one by which the Emperor forbade the alienation of dedicated lands under any circumstances[10]. It is consistent with the grants having been made to the juridical person symbolized or personified in the idol at Dákor. It is not consistent with this juridical person's being conceived as a mere slave or property of the *shevaks* whose very

(1) See Elton's Ten. of Kent, 17, 18.

(2) W. & B., H. L., 185 (*b*) Ulpian Fr. XXII, s. 6. They were thus placed *extra commercium*. Sav. Syst., sec. 88 (*o c*).

(3) Sav. Syst., sec. 88; comp. W. & B., 197.

(4) Sav. Syst., sec. 88. (5) Sav. Syst., sec. 88. (6) I. L. R., 6 Bom., 122.

(7) Sav. Syst., sec. 90; comp. *Kinlock* v. *Secretary of State for India in Council*, L. R., 15 Ch. Div., at p. 8.

(8) W. & B., H. L., 185, 197.

(9) See Cod. Lib. I, Tit. 2, Fr. 21; W. & B., H. L., 555, 557. See also *Rupt Jugut* v. *Krishnáji Govind*, I. L. R., 9 Bom., p. 160.

(10) Vyav. May., Chap. IV, S. VII, p. 23; Nov. 120, cap., 10.

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title implies not ownership, but service of the god. It is indeed a strange, if not wilful, confusion of thought by which the defendants set up the Shri Ranchhod Ráiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but, as a mere block of stone, their property for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of the foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land. Those who take physical possession of the one as of the other kind of property incur thereby a responsibility for its due application to the purposes of the foundation—compare *Griffin* v. *Griffin*(1); *Mulhallen* v. *Marum*(2); *Aberdeen Town Council* v. *Aberdeen University*(3). They are answerable as trustees even though they have not consciously accepted a trust, and a remedy may be sought against them for mal-administration(4) by a suit open to any one interested, as under the Roman system in a like case by means of a *popularis actio*.

The evidence of the witnesses in the case, even of the defendants who were examined, supports the view of the Dákor temple and of the *shevaks*' connection with it which has just been stated. The gift, (exhibit 238), is of land to the deity for daily food. The grant (exhibit 237) for feeding sacred cows is of a like kind. It is generally admitted that rich offerings, such as the silver throne presented by the Gáekwár, have been stored in the temple treasury. Defendant Kalidás (exhibit 133) says that for seven hundred years the *shevaks* have appropriated what could no longer be applied to the use of the deity. Their proprietorship, he says, subsists only through Shri Ranchhod Ráiji. The defendant Bechar Mádhavrám (exhibit 137) insists strongly on the *shevaks*' right even to sell the temple lands, but he gives no instance of it; and Lakshman (exhibit 139) admits that offerings are dedicated to the deity, though still he says the *shevaks* take them as owners. "While the idol is present," this witness says, "the shrine is his. In his absence it is ours." This is another instance of the confusion of thought or want of power of abstraction, which, more

(1) 1 Sch. & Lef., 352.
(2) 3 Dr. & War., 317.
(3) L. R., 2 Ap. Cas., 544.
(4) Comp. Ind. Trusts Act II of 1882, ss. 88, 95.

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perhaps than any positively dishonest intention, has led the *shevaks* to commit themselves to a false and untenable position. The witness Shivlál (exhibit 157) says, the *shevaks* take all the offerings, but still "as representatives of the deity." Jamnádás (exhibit 197), a bountiful donor to the temple, says, the offerings are made to the god, though the *shevaks* divide them at their discretion. This is what the *shevaks* would naturally do, even as managers, unless called to account by some superior authority It by no means necessitates the conclusion that they are and have always been owners of the idol as a juridical person—*Juggodumba Dossee* v. *Puddomoney Dossee*[1]. They are a numerous body, about one hundred and fifty in number, succeeding to their offices by hereditary descent. It is admitted that they are entitled to a fair provision for their needs and to maintain the service of the temple. For a period extending over several centuries the revenues of the temple seem to have but slightly, if at all, exceeded the outlay required to maintain its services, but recently these revenues have very largely increased. The law which protects the foundation against external violence guards it also internally against mal-administration, and regulates, conformably to the central principle of the institution, the use of its augmented funds. It is only as subject to this control in the general interest of the community that the State through the law courts recognizes a merely artificial person[2]. It guards property and rights as devoted, and thus belonging, so to speak, to a particular allowed purpose only on a condition of varying the application when either the purpose has become impracticable, useless or pernicious, or the funds have augmented in an extraordinary measure. This principle is recognized in the law of England as it was in the Roman law, whence indeed it was derived by the modern codes of Europe. It is equally consistent with the Hindu law, which, as we have seen, undoubtedly recognizes artificial juridical persons,[3] such as the institution at Dákor, and could not, any more than any other law, support a foundation merely as a means of squandering in waste or profligacy the funds dedicated by the devout to pious uses.

(1) 15 Beng L. R., 318. (2) See Sav. Syst., sec. 80.

(3) See *Rupd Jayeet* v. *Krishndji Govind*, I. L. R., 9 Bom., p. 169.

For the reasons we have given, we must reverse the decree of the District Court, and order that the costs of the suit and appeal be borne by the defendants. The District Judge will take steps, either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple without disturbance of its services. He will take an account of the property and of the receipts and disbursements of the temple, such latter account being carried back to the year 1872, and beginning with such property as can be ascertained to have been then in existence. He will make the requisite orders for recovering property misappropriated and sums due to the foundation as well from others as from the *shevaks* or any of them. He will draw up a scheme for the future management of the temple and its funds, giving due consideration to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it. Lastly, should there appear to be a surplus of revenue that may reasonably be counted on as durable, he will frame a scheme for the disposal of such surplus or a part thereof consistently with the general purpose of the foundation and complementary to the arrangements made under this Court's orders in *Manohar* v. *Keshavrám*[1] on the appeal in the suit brought by the *shevaks* against Ganesh Manohar as defendant.

Decree reversed and case remanded.

(1) *Manohar* v. *Keshavrám*.—This suit was at first filed in the Court of the First Class Subordinate Judge at Ahmedabad by the plaintiff Manohar Ganesh Támbekar alone without the consent of the Advocate-General. The suit was dismissed in appeal No. 11 of 1878(1), for the reason stated in the following judgment of Mr. Justice West :—

"It appears that the suit, in which the injunction in question was granted, was clearly one by Manohar, the plaintiff, as a person having an interest in an alleged trust. He came forward, not in the assertion of any right of private property, which he averred to have been infringed by the defendants, but to enforce the performance by them of duties connected with the shrine of Ranchhod Ráiji, the worship at that shrine, and the revenues arising from offerings made by worshippers at it. This is the kind of case contemplated by section 539 of the Code of Civil Procedure. As a dissenting chapel in England may be the subject of an information by the Attorney General as a charitable institution (*Attorney General* v. *Fowler* (2)) so we think that a trust for a Hindu idol and temple is to be

(2) 18 Ves., 80

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regarded in India as one 'created for public charitable purposes'. If that is so, a suit relating to the temple of Ranchhod Rájji was not competent to Manohar alone or without the consent, in writing, of the Advocate-General Moreover, it could not be instituted in a Court inferior to the District Court. The Court of the Subordinate Judge no longer has jurisdiction in such cases

"For these reasons, we must refuse to restore the injunction set aside by the Subordinate Judge His predecessor seems to have had no authority to make it." (Printed Judgments for 1878, page 252.)

APPELLATE CIVIL.

Before Mr Justice West and Mr Justice Birdwood

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ZIULNISSA' LA'DLI BEGAM SA'HEB, (ORIGINAL DEFENDANT), APPELLANT, v MOTIDEV RATANDEV, (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), Sec 19—Oral evidence of acknowledgment—Admissibility—Acknowledgments made before the coming into force of Act XV of 1877—Evidence

Under section 19 of the Limitation Act, XV of 1877, oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before the Act came into operation

SECOND appeal from the decree of S. Hammick, District Judge of Surat, confirming the decree of Khán Báhádur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 201 of 1883.

The plaintiff sued to recover the sum of Rs. 775, with interest, being the balance of an account for moneys lent and advanced to the defendants Nos. 1 and 2 through their agent, defendant No. 3.

The original loan was made in 1876. At the end of every year the account was adjusted, a balance was struck, and a new receipt or acknowledgment was passed by defendant No. 3 as agent for defendants Nos. 1 and 2. The last of such acknowledgments was dated 3rd November, 1880 Within three years from this date the present suit was filed in 1883.

The plaintiff produced the last acknowledgment only in support of his claim The previous ones, he alleged, had been

* Second Appeal, No. 24 of 1885.

returned to defendant No. 3, and were not forthcoming. He, therefore, adduced oral evidence to prove the intermediate acknowledgments.

The defendants contended that the suit was barred by limitation

Both the lower Courts overruled this contention, and passed a decree for the amount claimed against defendants Nos. 1 and 2.

Against this decree a second appeal was preferred to the High Court.

Mánekshán Jehángirshán for the appellant:—Section 19 of the Limitation Act (XV of 1877) expressly provides that oral evidence shall not be received of the contents of an acknowledgment, if it is lost or destroyed. This provision is a repetition of that in section 20 of Act IX of 1871. In the present case the original loan was made in 1876 There is no acknowledgment of that loan till 1880. The intermediate acknowledgments cannot be proved by oral evidence. The debt is, therefore, barred.

Gokuldás Kahándás Párek for the respondent:—The acknowledgment, upon which the plaintiff relies, is not a bare acknowledgment of a past liability It is, in fact, a new promise to pay a time-barred debt. Section 19 of Act XV of 1877 does not exclude oral evidence of a document handed to the debtor.

WEST, J.:—In this case an acknowledgment, dated 3rd November 1880, is relied on by the plaintiff as having, as the last of an annual series, kept alive his right to sue for a debt contracted and due on the 22nd October, 1876. The intermediate acknowledgments, it is said, were given back, and it is contended that, on proof of this, they can be proved by oral evidence so as to bridge over the interval of four years between the original obligation and the acknowledgment actually produced. But section 19 of the Limitation Act, XV of 1877, says clearly that oral evidence of the contents of an acknowledgment may not be received, nor is there any saving of acknowledgments received or given back before the Act came into operation. We are constrained, therefore, to apply the enactment to which we have referred, and the true sense of which cannot be doubted after a comparison with the corresponding section 20 of Act IX of 1871.

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It excludes the intermediate acknowledgments as resting on oral proof, by which the one of 3rd November, 1880, might have been made to bear on a debt then still not barred by limitation, and we must consequently reverse the decrees of the Courts below and reject the claim. Costs in this Court to be borne by the respondent and in the Courts below as there adjudicated.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

GOVIND ATMA'RA'M, (ORIGINAL DEFENDANT), APPELLANT, *v.* SANTAI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Evidence—Burden of proof—Suit by a claimant to property under attachment.

The defendant having attached certain property as belonging to his judgment-debtor B, the plaintiff applied for the removal of the attachment, alleging that she had purchased the property from B prior to the defendant's decree. Her application was rejected, and an order maintaining the attachment passed The plaintiff thereupon brought the present suit to establish her right to the property in question The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge, who reversed the lower Court's decree, holding that it was incumbent on the defendant to show that the alleged transaction of sale was fictitious. On second appeal by the defendant to the High Court,

Held, that the District Judge was wrong in throwing the burden of proof on the defendant. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugned that order by the present suit, to prove her case. For this purpose it was necessary for the plaintiff to prove the payment of the purchase-money, and that she had been in possession since the alleged sale.

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Sátára.

The defendant had obtained a decree against one Bálkrishna, and attached his property in execution. The plaintiff, who was Bálkrishná's mistress, applied to have the attachment removed, on the ground that the property belonged to her, but her application was rejected and an order maintaining defendant's attachment passed The plaintiff, therefore, brought this suit to establish

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her right to the property. She alleged that she had purchased it from Bálkrishna for Rs. 600, and had been in possession and enjoyment of it.

The defendant contended *(inter alia)* that the sale to the plaintiff was fictitious and had been effected for the purposes of screening the property from attachment.

The Court of first instance held that the transaction of sale was fictitious, and accordingly rejected the plaintiff's claim.

On appeal by the plaintiff, the District Judge reversed the lower Court's decree with the following remarks:—

"My finding is that the defendant has not proved the sale transaction to be collusive * * *. Both of the deeds of sale produced by the plaintiff are registered, and they are both anterior to the date of the defendant's decree, which was passed on 25th February, 1881. It is quite possible that they were executed by Bálkrishna to prevent his property from falling into the hands of his creditors. That circumstance alone does not make the transaction a collusive one. Fraud must be proved, and not presumed. It was incumbent on the defendant to show that the transaction was altogether a fictitious one,—that is to say, that the ownership still remained with Bálkrishna, and that the transfer was a nominal one only * * *."

From this decision the defendant preferred a second appeal to the High Court.

Ganesh Rámchandra Kirloskar for the appellant:—The District Judge was wrong in throwing the burden of proof on the defendant. The plaintiff having failed in successfully resisting the attachment was bound to prove her title—*Tillakchand Hindumal* v. *Jitamal Sudárám*[1]; *Rajan Harji* v. *Ardeshir Hormusji*[2]. Under the Civil Procedure Code (Act XIV of 1882) the plaintiff was bound to prove her purchase and her possession since the purchase.

SARGENT, C. J.:—The Judge says that "it was incumbent on the defendant to show that the transaction (*viz.*, the alleged sale to plaintiff) was altogether a fictitious one." This view is, however,

(1) 10 Bom. H. C. Rep., 206. (2) I. L. R., 4 Bom., at p. 74.

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opposed to the ruling in *Tillakchand Hindumal* v. *Jitamal Sudárám*[1], as explained in *Rajan Harji* v. *Ardeshir Hormuaji Wadia*[2]. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase-money, and that she had since been in possession.

As the Judge has considered the evidence from a wrong point of view, we cannot accept his conclusion on the question whether the sale to the plaintiff was a real transaction, and must reverse the decree, and send back the case to the lower Court of appeal for a fresh decision. Costs of this appeal to be costs in the cause.

Decree reversed.

(1) 10 Bom. H. C. Rep., 206. (2) I. L. R., 4 Bom., at p. 74.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

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SHRIDHAR NA'RA'YAN, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNA'JI VITHOJI, (ORIGINAL DEFENDANT), RESPONDENT.*

Insolvency—Civil Procedure Code (Act XIV of 1882), Secs. 354, 355 and 356—Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.

By an order dated the 9th July, 1879, A. was declared an insolvent under section 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to

* Second Appeal, No. 457 of 1885.

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the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it.

Held, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under section 354 he under section 356 was directed to convert it into money. G., therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G.'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done.

The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with section 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.

THIS was a second appeal from a decision of G. McCorkell, Assistant Judge of Ratnágiri.

On the 12th July, 1873, one Atmárám mortgaged certain land, comprising nine fields, to the plaintiff, who forthwith granted the same in lease to his mortgagor.

In 1878 Atmárám having been arrested on a money decree, and brought before the Court, applied to be declared insolvent. He was accordingly declared an insolvent on the 9th July, 1879, and his property was made over to the názir as receiver, with an order to convert the same into money. In his petition Atmárám entered the land in question as subject to the plaintiff's mortgage. The plaintiff, although he received notice to appear and prove his debt, failed to do so, and was consequently omitted from the schedule.

The receiver subsequently sold one of the nine fields, which was purchased by Atmárám's undivided son Govind, and after satisfying the claims of the scheduled creditors made over to Atmárám the remaining eight fields and the residue of the purchase-money of the field that was sold. At the aforesaid sale the plaintiff was present, and gave notice of his claim as mort-

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gagee. In 1881, the plaintiff brought a suit against Atmárám to obtain possession of the mortgaged property, and on appeal obtained a decree. On the 30th September, 1882, and prior to the determination of the plaintiff's suit, Govind sold the field to the defendant.

In execution of the appellate Court's decree the plaintiff recovered possession of the eight fields, but on attempting to take possession of the ninth was obstructed by the defendant, who had been in possession of it since his purchase.

The plaintiff, therefore, brought the present suit.

The Court of first instance awarded the plaintiff joint possession of Atmárám's undivided share, which was to be ascertained by a separate suit.

The defendant appealed to the Assistant Judge, who reversed the lower Court' decree, with the following remarks:—

"The receiver or official assignee received not merely the equity of redemption, but the entire right, title, and interest of Atmárám in the *thikan* (field) * * * *. Section 354 of the Civil Procedure Code (Act XIV of 1882) vests in the receiver all the insolvent's property. Section 356 provides how the receiver is to dispose of the property, and under this section a mortgagee is treated merely as a secured creditor who comes in after certain privileged creditors, *viz.*, Government, and the costs of the decree-holder. It appears to me that, under these circumstances, it was the duty of the mortgagee to have come forward and put in his claim against the estate as well as the other creditors did. A notice was duly issued to, and served on, the mortgagee, but he did not come forward and prove his claim * * * *. By his insolvency Atmárám became, for the moment, incapable of possessing any property; and as the purchase was made by Govind with money borrowed for the purpose on his own responsibility, I consider that the *thikan* must be regarded as his self-acquired property, in which Atmárám has no interest whatever * * *".

From this decision the plaintiff preferred a second appeal to the High Court.

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Dáji Abáji Kharé for the appellant:—The failure of the appellant to comply with the notice to appear and prove his claim does not disentitle him to his right as a mortgagee—*Shridhar Náráyan* v. *Atmárám Govind*[1]. Govind bought only the right, title, and interest of Atmárám, which consisted of equity of redemption only. The receiver could sell nothing more. The defendant purchased only what Govind had.

Mánekshán Jehángirshán for the respondent:—The whole property became vested in the receiver, and section 356 of the Civil Procedure Code (Act XIV of 1882) gives full power to deal with the property as the Court directs. The respondent, therefore, bought the field free of the plaintiff's mortgage. The non-appearance of the plaintiff when cited was a waiver of his rights.

SARGENT, C. J.:—The language of sections 354, 355 and 356 is far from being as clear as might be wished; but we think that the Assistant Judge was wrong in holding that the mortgaged property could be sold by the receiver without either the consent of the plaintiff, (the mortgagee), or paying him off. By section 354 the equity of redemption, which was the only interest the insolvent had in the mortgaged premises, vested in the receiver, and section 356, which directs the receiver to convert the property into money, must be read with section 354 and as referring to the property vested in the receiver by that section. It is true that section 356 contemplates the payment of the debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with the preceding section, and must be understood as referring to those cases in which the mortgaged premises have actually been sold after coming to an understanding with the mortgagee. The language of section 31 of the Indian Insolvent Act (Stat. 11 and 12 Vic., cap. XXI) directing the official assignee to sell the property and effects of the insolvent, was so treated by the Supreme Court of Calcutta: see the remarks of Sir L. Peel in *Llewellyn* v. *O'Dowda*[2]. Govind, therefore, only purchased the equity of redemption in the one field; and the defendant, who now stands in Govind's

(1) I. L. R., 7 Bom. 455 (2) Taylor's Reports, 169.

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shoes with notice of plaintiff's claim, although he may possibly be entitled to redeem the entire nine fields comprised in the mortgage, must deliver possession to the plaintiff, (the mortgagee), until that is done. We must, therefore, reverse the decree, and order that plaintiff be put into possession. Appellant to have his costs here and in the Courts below.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás, Mr. Justice Birdwood, and Mr. Justice Jardine.

1887.
December 20.

IN *RE* THE APPLICATION OF SHESHA'MMA'.*

Stamp Act I of 1879, *Sch. II, 1 (b)—Construction.*

S. being desirous of obtaining copies of certain records in a suit in the Court of the Subordinate Judge of Sirsi appeared before the názir and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative of one of the defendants in that suit, and needed the copies for the purpose of producing them in a suit filed against her in the Court at Kárwár. The affidavit together with a duly stamped application was presented by her pleader to the District Judge, who, being of opinion that the affidavit should be on a stamped paper, referred the case to the High Court.

Held, that the affidavit was exempt from stamp duty, under Schedule II, 1 (*b*) of the Stamp Act I of 1879.

THIS was a reference by E. H. Moscardi, Acting District Judge of Kánara, under section 49 of Act I of 1879. The case was stated as follows:—

"One Sheshámmá kom Manjáppá, inhabitant of Sirsi, being desirous of obtaining copies of certain records of Suit No. 419 of 1872 of the Sirsi First Class Subordinate Judge's Court, appeared before the názir and clerk of the Subordinate Judge's Court at Sirsi, and made affidavit to the effect that she was the daughter and legal representative of one of the defendants in that case, and that she urgently needed the said copies for presentation in a certain suit that had been filed against her. This affidavit together with a duly stamped application for the said copies was presented by her pleader to the District Judge of Kánara, who referred the following question for the High Court's decision:—

* Civil Reference, No. 39 of 1887.

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"Does the affidavit in question require to be written on stamped paper?"

The District Judge's opinion on the point was in the affirmative.

There was no appearance for the applicant.

PER CURIAM:—The question depends on the construction of the words of Act I of 1879, Sch. II, 1 (*b*) "for the immediate purpose of being used or filed in any Court, or before the officer of any Court." The mere fact that it suited the convenience of the party making the affidavit to make it at Sirsi, instead of going for that purpose to the Court at Kárwár, where she purposed to file it, does not, we think, take the instance out of the words or the intention which may reasonably be imputed to the Legislature.

"When a statute requires that something shall be done 'forthwith,' or 'immediately,' or even 'instantly,' it would probably be understood as allowing a reasonable time for doing it"—Maxwell on Statutes, p. 423, (2nd ed.) See *Toms* v. *Wilson*[1], *Massey* v. *Sladen*[2], and *Forsdike* v. *Stone*[3]. The last case shows that the test is whether, under the circumstances, there was such unreasonable delay as would be inconsistent with what is meant by "immediate". From examination of the dates we think we may infer that the purpose existed at the time the affidavit was made of filing it in the Court at Kárwár, and that this purpose was carried out promptly. We are, therefore, of opinion that the affidavit is exempt.

(1) 32 L. J., Q. B., pp. 33, 382.
(2) L. R., 4 Ex., p. 13.
(3) L. R., 3 C. P., p. 607.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

1888. *January* 9.

VISHNU HARI KULKARNI (ORIGINAL PLAINTIFF), APPELLANT, *v.* GANU TRIMBAK (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Bombay Act III of 1874*—Vatandár kulkarni and rayat—Perquisites, right to.*

Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a *vatandár kulkarni* is entitled to receive perquisites from his *rayat*.

SECOND appeal from a decision of M. B. Baker, District Judge of Násik.

The plaintiff, who was the hereditary *kulkarni* of the village of Maturi, in the Násik District, sued the defendant, who was a *rayat* of the village, to recover from him certain perquisites of corn and raw sugar, or the equivalent in money. The plaintiff alleged that from time immemorial these perquisites had been paid by each cultivator of the soil. The defendant denied that he had ever made any such payment to the plaintiff, and he contended that the Civil Court had no jurisdiction to try this suit.

The Court of first instance awarded the plaintiff's claim.

The District Judge, on appeal by the defendant, reversed the lower Court's decree.

The plaintiff appealed to the High Court.

Dájí Abáji Kharé for the appellant:—Act III of 1874 does not deprive the Civil Court of its jurisdiction to determine the right of a *vatandár kulkarni* to perquisites from his *rayat*. See rule on section 17 of the Revenue Rules.

Mahádev Chimnáji Apte for the respondent:—Such a suit cannot be tried by a Civil Court. Under section 17 of the Act the Collector is given the power of the Civil Court—*Khando Náráyan Kulkarni* v. *Apáji Sadáshiv Kulkarni*(1).

NA'NA'BHA'I HARIDÁS, J.:—Where the question between a *vatandár kulkarni* and a *rayat* is whether the former is entitled to re-

*Second Appeal, No. 482 of 1885.

(1) I. L. R., 2 Bom., 370.

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ceive any perquisites at all from the latter, we do not think the jurisdiction of the Civil Court to try that question is taken away by any provision of Bombay Act III of 1874. We, therefore, reverse the District Judge's decree, and remand the case, in order that he may determine, as the Subordinate Judge has done, upon the evidence in the case, what amount, if any, is due to the plaintiff for the year 1881-82, and pass a fresh decree accordingly, awarding costs, the Collector not having yet exercised his powers under section 17 of that Act. But neither this decree nor any the District Judge may make is to affect the Collector's powers under that section when he chooses to exercise them. Respondent to pay the costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Nánabhái Haridás and Mr. Justice Jardine.

1888.
February 7.

MUSA'JI ABDULLA' AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. DA'MODARDA'S (ORIGINAL PLAINTIFF), RESPONDENT.*

Practice—Appeal—Civil Procedure Code (Act XIV of 1882), Secs. 545, 244 (Clause 3), 588 and 2—Order rejecting stay of execution appealable.

An order by a District Judge, under section 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution is a decree as defined in section 2, and is, therefore, appealable.

THIS was an appeal from a decision of S. Hammick, District Judge of Surat.

The plaintiff obtained a decree against the defendant. The latter appealed. The plaintiff having applied for execution, the defendant applied for a stay of execution pending the appeal. The District Judge being, however, of opinion that no substantial loss would result to the appellants if execution were proceeded with, ordered execution to issue.

From this order the defendants appealed to the High Court.

Shántárám Náráyan, for the respondent, raised a preliminary objection that no appeal lay from such an order. This order is not a decree, and it is an order of a Court not executing the decree, and, therefore, not one within section 244 of the Civil Procedure Code (Act XIV of 1882). No appeal will, therefore, lie.

Mánekshán Jehángirshán, for the appellants, cited *O. Steel &*

* Appeal No. 82 of 1887.

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MUSÁJI ABDULLÁ v. DAMODARDÁS.

Co v. *Ichchamoyi*[1], *Kristomohiny Dossee* v. *Bámá Churn Nag*[2], *Luchmeepat Singh* v. *Sitá Náth Doss*[3], *Mahant Ishwargar* v. *Chudasama*[4].

NÁNÁBHÁI HARIDÁS, J.:—We think an appeal lies in this case. The order of the District Judge under section 545, Civil Procedure Code, is one determining a "question ....referred to in section 244" (clause 3), and one "not specified in section 588," Civil Procedure Code It is, therefore, a "decree" as defined in section 2, Civil Procedure Code.

[The hearing of the appeal was then proceeded with, and, on the merits, the decree of the District Judge was confirmed with costs.]

(1) I L R, 13 Calc, 111.
(2) I L R, 7 Calc., 733.
(3) I L R., 8 Calc, 477
(4) I. L R, 12 Bom, 30

ORIGINAL CIVIL.

Before Mr Justice Jardine.

1887
Nov 16

CA'SSUMBHOY AHMEDBHOY, (PLAINTIFF), *v* AHMEDBHOY HUBIBHOY AND RAHIMBHOY ALLA'DINBHOY, (DEFENDANTS).*

Khojá Mahomedans, law applicable to—Partition—Right of a son to obtain partition of ancestral property in his father's lifetime without his father's consent—Distinction between ancestral and self-acquired property among Khojá Mahomedans—Custom, proof of—Practice—Evidence—Burden of proof.

Amongst Khoja Mahomedans a son is entitled to obtain partition of ancestral estate in his father's lifetime without his father's consent.

By the law and customs of Khojá Mahomedans there is a distinction between ancestral and self acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law

The presumptions of the Hindu law apply to Khojá Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them Therefore in a suit for partition brought by a son against his father who alleged that the customs and usages of the Khojá community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's lifetime a partition of the property in the father's hands whether ancestral or self-acquired,

Held that the burden of proving the issues framed upon these allegations lay upon the defendant

In considering the question of the alleged custom and usages the Court adhered to the less stringent rule of proof applied in *Hardhás* v. *Gorbás*[1]

* Suit No 382 of 1884.

(1) 12 Bom. H. C. Rep., 294.

In the same suit where the defendant having failed to establish the existence of the special custom and usages above mentioned, yet resisted the plaintiff's claim to partition on the ground that the property claimed was not ancestral,

Held that the *onus* was on the plaintiff, in the first instance, to give evidence that the property was ancestral. In such cases the amount of evidence required to shift upon the defendant the burden of displacing it, depends on the circumstances of each case.

THE plaintiff and the defendants in this suit were Khojá Mahomedans resident in Bombay. The plaintiff and the second defendant were sons of the first defendant, the plaintiff being his eldest son. The plaintiff brought this suit against his father and brother to obtain a partition of what he alleged to be the family estate.

The plaint alleged that the plaintiff's grandfather, one Hubibhoy Ibráhim (the father of the first defendant), died in 1865, and that under his will, dated the 29th December, 1864, the first defendant came into possession of a large amount of moveable and immoveable property; that the said property had since been largely added to, and was at the date of this suit of the value of about twenty lákhs of rupees. The plaintiff alleged that "by the laws and usages by which members of the Khojá community in Bombay are governed, which in this respect are the same as are applicable to Hindus, the property aforesaid in the hands of the first defendant is ancestral family property, and that the plaintiff on birth became a co-parcener therein with an interest equal to that of the said defendant." The plaintiff also alleged that the said estate was in danger of being wasted by the first defendant, and submitted that if the Court should hold that he was not entitled to partition, provision should be made to protect the said estate, and that a proper maintenance should be paid to him out of the income of the estate.

The plaintiff also alleged that his grandfather, the said Hubibhoy Ibráhimbhoy, prior to the execution of the will of December 1864 already mentioned, had executed another testamentary writing on the 22nd August 1864, by which he had divided his property into four equal parts, and directed that each of his three sons (including the first defendant) should take one part, and that the fourth of such parts should go to his grandson, the plaintiff; that the plaintiff being then a minor the testator directed that the first defendant should hold the said share in trust for him until he

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should attain the age of twenty-five years; that the first defendant objected to this arrangement as being invidious, and promised the testator that if the share intended for the plaintiff were added to his he would carry out the testator's wishes with respect to it; that the testator, being influenced by these representations of the first defendant and relying on his promise, executed the later will from which the bequest to the plaintiff was omitted, and which divided the estate into four equal parts, and gave two of such parts to the first defendant. The plaintiff submitted that if the Court should hold that he was not entitled to partition it ought to be declared that the first defendant was a trustee for the plaintiff in respect to the said one-fourth share in the estate of his grandfather on the terms of the will of the 22nd August, 1864, and that the said defendant ought to render an account of such share, &c. The plaint prayed for partition, discovery, and account, &c.

The first defendant in his written statement denied that the property in his hands was ancestral family property, or that the distinction recognised in Hindu law between ancestral and self-acquired property applied to Khojá Mahomedans in Bombay; and he denied that the plaintiff at his birth became a co-parcener. He contended that the said property was solely and absolutely his own, and that the plaintiff had no claim to it or any part of it.

The first defendant also contended that the last will of Hubibhoy Ibráhimbhoy, dated 29th December, 1864, effectually revoked all prior testamentary dispositions which were of no effect, and conferred no estate on the plaintiff; he denied that he had by any representation or inducement procured the said testator to revoke any previous testamentary writing.

The second defendant did not take any contentious part in the suit.

At the hearing the following issues were framed:—

(1) Whether the property in the first defendant's hands, referred to in paragraph 4 of the plaint, came to the first defendant's hands as ancestral property.

(2) Whether plaintiff on birth or at any time became a co-parcener or sharer in such property.

(3) Whether plaintiff has any estate or interest in such property.

(4) Whether the said property is not the sole and absolute property of the first defendant.

(5) Whether Hubibhoy Ibráhim's will of the 29th December, 1864, did not revoke all prior testamentary writings made by him.

(6) Whether such revocation was procured or induced by any promise or representation of the first defendant to the said Hubibhoy Ibráhim, as alleged in paragraph 7 of the plaint.

(7) Whether the plaintiff is entitled to any and what part of the relief claimed.

(8) Whether the property in the hands of Hubibhoy Ibráhim, and devised by his will, was ancestral or self-acquired property.

(9) Whether by the law and custom of Khojás there is any distinction between ancestral and self-acquired property in respect of the power of the owner thereof to devise or make gift of the same.

(10) Whether the Nicol Spinning Mill at Colába was acquired by first defendant with ancestral monies, and whether the plaintiff is not entitled to a share therein.

Lang, *Inverarity*, and *Jardine* for the plaintiff.

Macpherson (Acting Advocate General) and *Starling* for the first defendant.

Vicáji and *Telang* for the second defendant.

Lang:—The *onus* of the first and fourth issues is on the first defendant. He must prove the property in his hands to be self-acquired. The Hindu law of inheritance and succession applies to Khojás, and the son at birth is entitled to share in his father's property; *Shivji Hasam* v. *Datu Mávji*.[1] A son is entitled to partition; *Jugmohándás Mangaldás* v. *Sir Mangaldás Nathubhoy*.[2] The Court will presume the property to be ancestral and partible The same rule applies to Kutchi Memons; *Mahomed Sidick* v. *Haji Ahmed*[3], *Abdul Cádur Háji Mahomed* v. *C. A. Turner*.[4] We do not contest issues 5 and 6 and will give no evidence on them.

(1) 12 Bom H. C. Rep., 231.
(2) I. L. R., 10 Bom., 1.
(3) I. L. R., 10 Bom., 528.
(4) I. L. R., 9 Bom., 158.

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Macpherson :—The *onus* of proof on the first and fourth issues is on the plaintiff. The plaintiff alleges that the property in suit comes to the first defendant by his father's will which is undisputed. The will declares the property to be the self-acquired property of the testator.

Lang:—The recital in the will is no evidence; *Mohomed Sidick* v. *Haji Ahmed*(1). We rely on the will only to show what the property was. It is for the defendant to show that Hindu law does not apply; *Rúj Bahádur* v. *Bishen Dayal*(2).

(JARDINE, J. :—I think the burden of proof as to issues 1 and 4 rests on the defendant.)

Jardine for the plaintiff.—Ordinary Hindu law applies to Khojás and Memons except a custom to the contrary is shown as to Khojás, *Khojáhs' and Memons' Case*(3); *In the Goods of Mulbái*(4); *Shivji Husum* v. *Datu Mávji*(5); *Rahimatbái* v. *Hirabái*(6). As to Kutchi Memons, *Abdul Cadur Haji Mahomed* v. *C. A. Turner*(7), *Mahomed Sidick* v. *Haji Ahmed*,(8) Hindu law presumes union. The defendant alleges a custom to the contrary. As to proof of custom, *Bhagvándás Tejmal* v. *Rajmal*(9); *Mahomed Sidick* v. *Haji Ahmed*(10); *Jugmohundás Mangaldás* v. *Sir Mangaldás Nathubhoy*(11).

Starling for the first defendant.—If Hindu law applies to the Khojás, which school of Hindu law will the Court apply. Counsel referred to Manu, clause Q, sl. 104; 2 Colebrook, 196. The Khojá law is Hindu law modified by custom; *In the Goods of Mulbái*(12).

JARDINE, J. :—The plaintiff Cássumbhoy is the eldest son of the first defendant Ahmedbhoy Hubibhoy; the 2nd defendant Hosseinbhoy, a minor, is another son of Ahmedbhoy. The parties belong to a family of Khojás who have for several generations carried on mercantile business in Bombay. The plaint was filed

(1) I. L. R., 10 Bom., 1
(2) I. L. R., 4 All., 343.
(3) Perry's Or. Cas., 110.
(4) 2 Bom. H.C. Rep., 276.
(5) 12 Bom. H. C. Rep., 291—294.
(6) I. L. R., 3 Bom., 34.
(7) I. L. R., 9 Bom., 158.
(8) I. L. R., 10 Bom., 1.
(9) 10 Bom. H. C. Rep., 234—260.
(10) I. L. R., 10 Bom., 1.
(11) I. L. R., 10 Bom., [528] at p. 540.
(12) 2 Bom H. C. Rep., 276.

on the 9th October, 1884. In the first three paragraphs it alleges that Ahmedbhoy's father, one Hubibhoy, son of Ibráhim, died in A.D. 1865, whereupon, and under Hubibhoy's will, dated the 29th December, 1864, Ahmedbhoy came into possession of a large amount of property, moveable and immoveable, which said property in his hands has been largely added to by the accretions thereof and aggregates, as plaintiff estimates, about 20 lákhs. In paragraph 4 the plaintiff says that "according to the laws and usages by which members of the Khojá community in Bombay are governed, and which, in this behalf, are the same as are applicable to Hindus, the property aforesaid in the hands of the said defendant is ancestral family property, and that the plaintiff on birth became a co-partner therein with an interest equal to that of the said defendant." The plaintiff goes on to say that there have been disagreements between plaintiff and Ahmedbhoy, and that he is no longer willing that the latter "should remain in the possession and management of the said family estate, but desires that the same should be partitioned between the plaintiff and the defendants, which partition the plaintiff submits he is entitled to enforce." Plaintiff further states that he fears Ahmedbhoy may waste the property, and therefore he asks the Court to secure to him his share if the Court should hold that he is not entitled to a partition of the estate or any portion thereof. "The plaintiff further submits that in such event this Honorable Court should direct that a sum proportioned to the plaintiff's interest in the said estate remaining undivided should be paid out to him from the income thereof by way of maintenance." Then follow paragraphs 7 and 8 relating to a claim to a fourth part of Hubibhoy's residuary estate based on the circumstances under which an earlier will of Hubibhoy's (Exhibit 64), dated the 22nd August, 1864, bequeathing such a share, was revoked. No evidence has been given on this part of the claim to which the 5th and 6th issues relate. The plaintiff concludes with a prayer:—(*a*) for an account and partition of the said family estate in equal shares among plaintiff and the defendants, (*b*) for a discovery of the property come to Ahmedbhoy's possession from Hubibhoy and of all accretions of the same; (*c*) for directions to preserve plaintiff's share if partition is refused, (*d*) for

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maintenance in the like event; (*e*) for relief in the matter of the revoked will; (*f*) for proper directions; and (*g*) for costs.

The defendant Ahmedbhóy, in his written statement, admitted the correctness of paragraphs 1, 2, and 3 of the plaint except as to the estimated value of the property. He then "denies the allegation contained in the 4th paragraph of the plaint that the property now in the hands of this defendant, as in the same paragraph stated, is ancestral family property according to the laws and usages governing the Khojá community in Bombay. This defendant denies that the distinction according to Hindu law between ancestral and self-acquired property has any application to, or has ever been recognized, or acted on by any Khojás in Bombay, and this defendant says that the plaintiff did not on birth, or at any time become a co-partner, or share to any extent in the said property with this defendant. This defendant says that the said property is his solely and absolutely, and that the plaintiff has no estate nor interest whatever therein." Ahmedbhoy further states that the disagreements were caused by plaintiff's misconduct, denies mismanagement and waste and the right of plaintiff to interfere, denies plaintiff's rights to any thing under the revoked will, and finally denies that plaintiff is entitled to any portion of the relief claimed.

The defendant Hosseinbhoy, a minor, has appeared by his guardian *ad litem*, who has left plaintiff's claims entirely to the judgment of the Court.

The following issues were raised at the first hearing on the 22nd March, 1887:—1. Whether the property in the first defendant's hands, referred to in paragraph 4 of the plaint, came to first defendant's hands as ancestral property. 2. Whether plaintiff on birth or at any time became a co-partner or sharer in such property. 3. Whether plaintiff has any estate or interest in such property. 4. Whether the said property is not the sole and absolute property of the first defendant. 5. Whether Hubibhoy Ibráhim's will of the 29th December, 1864, did not revoke all prior testamentary writings made by him. 6. Whether such revocation was procured or induced by any promise or representation of the first defendant to the said Hubibhoy

Ibráhim, as alleged in paragraph 7 of the plaint. 7. Whether the plaintiff is entitled to any and what part of the relief claimed. The following were raised on the 4th April to elucidate the first issue:—8. Whether the property in the hands of Hubibhoy Ibráhim and devised by his will was ancestral or self-acquired property. 9 Whether by the law and custom of Khojás there is any distinction between ancestral and self-acquired property in respect of the power of the owner thereof to devise or make a gift of the same. On the 30th April the following issue was raised:—10. Whether the Nicol Spinning Mill, at Colába, was acquired by first defendant with ancestral monies and whether the plaintiff is not entitled to a share therein. The learned counsel for plaintiff stated to the Court that he did not contest the 5th issue. He has offered no evidence on the 6th issue, and it has been arranged between the parties that the matter of the 10th issue shall be left to the Commissioner in the event of the Court decreeing a partition and account.

At the first hearing I ruled after argument that in the absence of proof of special custom the presumptions of the Hindu law of inheritance applied, and that the burden of proving under the first four issues propositions opposed to that law was at starting on the defendants. It was urged by Mr. Starling for the first defendant (whom I will hereafter call the defendant) that the plaint required amendment, being based on the assumption that what passed by Hubibhoy's will was Hubibhoy's self-acquired property, yet became ancestral and subject to partition at Hindu law in the hands of Ahmedbhoy according to the opinion generally held before the case of *Jugmohandás Mangaldás* v. *Sir Mangaldás Nathubhoy*,[1] decided in 1886. I held that no amendment was necessary as the language of the plaint did not confine the right alleged to relief to any particular view of the mode whereby the property of Hubibhoy became ancestral in defendant's hands. That case decided that at Hindu law "a son to whom his father leaves his self-acquired property by will takes the property under the will, and not by inheritance; and that as property received by will is held by Hindu law to be

(1) I. L. R., 10 Bom., 523.

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received by gift, such property is self-acquired in the hands of the son, and is not subject to partition." Plaintiff's claim in the present suit is confined to the property received by defendant under his father Hubibhoy's will and the accretions made thereof. The endeavour of the defendant as shown by the evidence produced and the arguments advanced by his counsel has been to gain the advantage of the above ruling by showing on the facts that Hubibhoy's wealth was self-acquired without a nucleus of ancestral property, and thus not subject to partition under the Hindu law on which plaintiff and his counsel have based the claim, and, in any event, whatever may be the finding of the Court as to Hubibhoy's property having been in his hands ancestral or self-acquired, it is urged for defendant that this Hindu law, or at any rate the Hindu law now generally applicable in Bombay, is not identical in matters of partition with the laws and usages governing the Khojás in Bombay, which laws and usages, or customs, it is urged, do not confer on a son any right to demand in the father's lifetime any partition of the property in the father's hands whether ancestral or self-acquired, the distinction between these kinds of property at Hindu law never having been recognised or acted upon by any Khojás in Bombay. Mr. Starling, as counsel for the defendant, argues that these variations from the ordinary Hindu law of the Mayukha and Mitákshara originate in an older form of Hindu law, which in the peculiar conditions, local and religious, of the Khojá community has been in these matters retained and followed by them as custom. On the other hand, Mr. Jardine, as counsel for plaintiff, argues that the decisions of this Court and of the Supreme Court have made the ordinary Hindu law applicable to Khojás, except where a contrary custom is proved. It is admitted that the questions whether among Khojás, a son has a right to demand partition during his father's lifetime, and whether there is any difference in respect of the father's power to alienate ancestral and self-acquired property have never yet received judicial decision. The determination of these questions is of general importance to the Khojá community, among whom, as the evidence shows, they have been discussed some years ago in connection with a legislative proposal of the Government of

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India. The subject is part of the wider question as to how far what the parties call the laws and usages of the Khojás are based on the law of their origin, *i. e.* the Hindu law, and for this reason, and to enable the Court to deal with the questions of *onus probandi* and to estimate the legal circumstances existing when such matters of evidence occurred, as acts done or acquiesced in, or pleadings in older suits, it is convenient here to examine the cases cited to show the extent and limits within which the Courts have held the Khojás to be governed by ordinary Hindu law. The cases relating to Memons, who, like the Khojás, are Hindus in origin and have become Mahomedans in religion, will also be noticed as bearing on the same subject.

The first reported decision is that of Sir E. Perry, Chief Justice of the late Supreme Court, in the *Khojahs' and Memons' Case*(1) in 1847 in which it was ruled that "if a custom, as to succession, is found to prevail amongst a sect of Mahomedans and be valid in other respects, the Court will give effect to it, although it differs from the rule of succession laid down in the Koran." It was held that a custom excluding daughters from a share in a deceased father's property was valid, and the daughter's claim against the father's brother's representatives was rejected. Sir E. Perry's report states that "at the trial at the Bar of these Equity suits on *vivâ voce* evidence, both the Khojás and the Memon Kutchis were proved to be settled for the most part in Hindu countries, principally Kutch and Káthiáwár, and the belief amongst themselves was, that they had been converted from Hinduism about three or four hundred years ago. The rule of succession, which prevailed amongst them, was nearly analogous to the Hindu rule of succession." One witness was Hubibhoy Ibráhim, defendant's father, who deposed as follows about the Bombay Khojás, (exhibit 133) :—"It is said they came originally from Bhávnagar and Kutch. Our grandfathers used to say they were originally Hindus and became Mahomedans long ago. We do not regulate inheritance in our caste by the Mahomedan law, but according to the customs prevailing from time immemorial in our caste. I believe it is according to Hindu customs." In his judgment

(1) Perry's Or. Cas. 110.

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in the *A'ga Khán Case*,[1] Sir J. Arnould observes that this litigation divided the Khojás of Bombay into two hostile parties, the Ága trying to uphold the rule of inheritance as laid down in the Koran, while Hubibhoy Ibráhim and his partizans took an active part on the other side. In 1863 the case of *Gangbái* v. *Thávar Mulla*[2] was decided by the Supreme Court on the Equity side by Sausse, C. J., who remarked that "the Khojá caste, although Muhammadan in religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance." The next case is that of *In the Goods of Múlbái*[3] decided by Couch, C.J., on the Ecclesiastical side of this Court in February 1866. The learned Chief Justice followed Sir E. Perry's ruling giving effect to custom. There was a question whether by the custom of Khojá Mahomedans when a widow dies intestate and without issue, property acquired by her from her deceased husband descended to her own blood relations or to the relations of her deceased husband. The Court thought the balance of testimony to be greatly in favour of the existence of a custom which excludes the relations of the widow. Sir R. Couch went on: "What may be the origin of this custom among the Khojás I shall not now inquire. It is very possible that it arises from some analogy to be found in the Hindu law. I agree with the observations of the counsel for the caveator, that the law by which the Khojás are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established that there is a Khojá custom which excludes the wife's relations from succeeding to property such as this." In November, 1866, Arnould, J., delivered his long and interesting judgment in the *A'gá Khán Case*[4] in which he answers the question "Who and what are the Khojás?" He says: "From the evidence adduced in this case, the more probable conclusion, I think, is that the Khojás were originally Hindus of the trading class, inhabiting the villages and towns of Upper Sind. Their language is Sindi or Kutchi—a cognate

(1) 12 Bom. H. C. Rep., 323.
(2) 1 Bom. H. C. Rep., 71, at p. 73.
(3) 2 Bom. H. C. Rep., 276, at p. 284.
(4) 12 Bom. H. C. Rep., at pp. 343 and 344.

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dialect, and such ancient religious works as they possess are written in the Sindi language and character. Sind, an early Mahomedan conquest, has long had a large Mahomedan population, but a considerable portion both of the retail and wholesale business of the country has always remained in the hands of the Hindus. The position and circumstances of these remote and isolated Hindu traders were manifestly such as to favour their conversion to some form or other of Mahomedanism. That they were so converted by Pir Sadrdin, about 400 years ago, is admitted by both the contending parties in the Khojá community. . . From Sind the Khojá conversion would appear to have spread into Kutch, thence into Káthiáwár, and through Gujarát to Bombay. In the present time, Khojá communities are to be found in almost all the large trading communities of Western India and on the sea-board of the Indian Ocean. The Khojás are all, as a rule, engaged either in retail trade or commerce and frequently prosecute both with considerable success."

The foregoing decisions are discussed in *Shivji Hásam* v. *Datu Márji*,[1] decided by Westropp, C.J., and West, J., in 1874. It was contended that Khojás are not regulated by the law applied to Hindus who are undivided in family and estate. Westropp, C.J., says: "The traditionary doctrine of the Supreme Court and of the High Court has, for upwards of, at least, twenty-five years, been that, in the absence of proof of special usage to the contrary, the law applicable to Khojás is, in matters relating to property, succession, and inheritance, the Hindu Law as administered in this presidency . . . No evidence has been given to the effect that the ordinary rule in Bombay, *viz.* that of the Hindoo law, is not applicable to Khojás at Thánáa. We think, therefore, that we are bound to apply to them the Hindu law." In 1875 all these cases and others were considered by Sargent, J., in *Hirbái* v. *Gorbái*[2]. His conclusions were as follows:—"This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir M. Sausse,

(1) 12 Bom. H. C. Rep., 281, at pp. 292 and 293.
(2) 12 Bom. H. C. Rep., 294, at pp. 304, 305 and 321.

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in *Gángbái* v. *Thávar Mulla* (1) satisfactorily shows, I think, that the Khojás, have, for the last twenty-five years at least, been regarded by the Court, in all question of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that an uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved. It may be said that no express decision can be cited in support of either of the two propositions, that the Khojás were originally Hindus who were converted to Muhammadanism, retaining their Hindu laws and customs, or that this Court will always apply the Hindu law of inheritance in their case in the absence of special custom; but the uniform course of practice, extending over the last twenty-five years, has assumed the truth of the first proposition, and has never, I believe, deviated from the rule enunciated by the latter. Lastly, I may add that in a special appeal recently decided by Sir M. R. Westropp, C.J., and West, J., a question of inheritance having arisen as to the estate of a Khojá, the Court held that, in the absence of proof of a special custom, Hindu law must be administered. I need scarcely say that the opinion of the Chief Justice from his long experience in the ecclesiastical business of this as well as of the late Supreme Court, is especially valuable on a question of this nature. Under these circumstances this Court cannot but throw upon those who dispute the right of the widow to administer (a right which would be clearly hers under Hindu law) the burden of proving the existence of a custom inconsistent with that right." In appeal the views of the learned Judge are affirmed by Westropp, C. J., "It has here been generally assumed that, in the absence of proof of custom to the contrary, the law of succession and inheritance amongst the Khojás is the law of their origin, *viz.* Hindu. This has generally been assumed to be the rule, and was so expressly laid down in a *dictum*, by Sausse, C. J., in the case of *Gángbái* v. *Thávar Mulla*(1) . . In this state of the authorities we think that our brother Sargent was right in placing the burden of proof on the

(1) 1 Bom. H. C. Rep., 71.

mother and the distant male relations of the deceased intestate, as they were setting up customs not in conformity with Hindu law, whereas the widow's claim was completely consonant with Hindoo law."

In *Ashábái* v. *Háji Tyeb*,[1] a case among Kutchi Memons, Sargent, C.J., lays down that "so far as Khojás are concerned the decision of the Court of Appeal in *Hirbái* v. *Gorbái*,[2] must be taken as conclusively deciding that the *onus* of proving a custom of inheritance not in conformity with Hindu law lies upon those who set it up." On similar principles, the Mayukha, "a very high authority in Bombay," was referred to by the learned Chief Justice in determining a question regarding *stridhan*.

In *Hirbái* v. *Gorbái*[3] the Court of Appeal laid down a rule on the evidence of a custom among Khojás in the following terms:—"It is, however, evident from what has been said, that the Khojás are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law, or Hindus by the Hindu law, and hence it is that it would not be reasonable to require such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law, as from a Hindu . . . . Though the evidence at large is not such as in the case of Muhammadans proper or Hindus would suffice to establish an ancient and invariable custom, we think we must hold that it is sufficient to establish a custom in a community, such as this, placed midway between Muhammadans and Hindus. We think that, under such circumstances, the Court ought to act upon satisfactory proof that the custom has existed for a considerable time, and has been generally accepted by the great majority of the Khojá community." In *Rahimatbái* v. *Hirbái*[4] the tendency of the relaxation of the rule to encourage litigants to set up false customs is remarked upon. In the appeal, Westropp, C. J., said:—"We consider that in *Hirbái* v. *Gorbái* we have gone quite as far as we can properly go in applying a less stringent rule with regard to the evidence required to prove a

(1) I. L. R., 9 Bom. 115, at pp. 120 and 126.

(2) 12 Bom. H. C. Rep., 294.

(3) 12 Bom. H. C. Rep. 294, at pp. 321 and 322

(4) I. L. R., 3 Bom. 34, at p. 39.

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custom in the case of Khojá Muhammadans than we should do in the case of Hindus or Muhammadans proper. . . As it is now a settled rule that, in the absence of proof of a special custom to the contrary, Hindu law must regulate the succession to property amongst Khojás, it is clear that the burden of proving such special customs lay upon the defendant Rahimatbái who put them forward . . It was, however, admitted by the defendant's counsel that she had not adduced in evidence a single instance in which this alleged custom had taken effect. There is then nothing before the Court but the opinion of certain members of the Khojá community upon the two points in question, and we consider that if we were to decide in accordance with that opinion, contrary, as it is to Hindoo law, we should be assuming legislative powers." The cases cited show that Kutchi Memons are treated by this Court as following the Hindu law of inheritance except where special custom is proved; *Ashábái* v. *Háji Tyeb*,(1) *Abdul Cadur Háji Mahomed* v. *C. A. Turner*,(2) *Mahomed Sidick* v. *Haji Ahmed*(3). In the last of these the question, whether Kutchi Memons by a special usage recognize no difference in the power of alienation between ancestral and self-acquired property, was decided in the negative by Mr. Justice Scott.

The decisions which apply Hindu law to matters of property and inheritance in the absence of special custom appear to assume that the Hindu law applicable is the ordinary Hindu law, although this is not expressly stated, no contention having apparently been raised heretofore that any other form of Hindu law should be applied. Mr. Starling has argued, however, that there is a probability that the Khojás coming originally from Sind and Kutch, followed a more ancient form of Hindu law than prevails now. Assuming this to be probable, he wishes antecedent probability to be conceded to the customs set up, *viz.* the absence of distinction between ancestral and self-acquired property and the non-existence of any right of a son to a partition of family property during the lifetime of the father. He quotes Manu, C. 8, 416,

(1) I. L. R., 9 Bom., 115. (2) I. L. R., 9 Bom., 158.
(3) I. L. R., 10 Bom., 1.

C. 9, 104, and the texts of Devala, Sancha, Lichita and Harita found in 2 Colebrooke's Dig., 196, 199, 203, and 205. It is no doubt the opinion of jurists that there was a time when the distinction between ancestral and self-acquired property was not found. "Self-acquired property in the earliest state of Indian society did not exist. So where the family was of the purely patriarchal type, the whole of the property was owned by the father, and all acquisitions made by the members of the family were made for him, and fell into the common stock." (Mayne's H. L., s. 212). "It is quite certain that in the earlier period of Hindu law, no son could compel his father to come to a partition with him. Manu speaks only of a division after the death of the father, and says expressly that the brothers have no power over the property while the parents live." (S. 217). "We learn from the Smritis that a father might castigate, sell, cast off, give away and disinherit any of his sons at will, and that all acquisitions made by a son had to be given up to the father. The hereditary property may be disposed of at will by the head of the family." (Jolly's Tagore Law Lectures, 1883, pp. 81 and 82). Mr. Justice West in the following passage states his opinion of the changes which the Hindu law has undergone:—"The father appears in the earliest form of the law to have had unqualified administrative power and to have had complete dominion over the family." The rights of the manes at the same time made an alienation of the ancestral estate unlawful, and the interest felt in a son as a continuator of the family *sacra* to be celebrated with indispensable offerings out of the patrimony (See Vishnu, Transl. 189) raised him first in religion and then in law to a joint ownership with his father. It became recognized far earlier than at Rome that the "*patria potestas in benignitate non in atrocitate consistit*," as the highly affectionate character of the Hindus readily admitted sons to a position of secure equality in title, though not till afterwards in administration. Then followed the right of interdiction to guard against impious waste, and, lastly, the right to partition as a logical consequence of co-ownership. The archaic law has in part been revived by recent cases." West and Buhler's Hindu Law, pp. 713 and 714 (note), (3rd Edition). Again, as Mr. Mayne points out, the advance of

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civilization and commerce affected the older law of Baudháyana and Apastamba and self-acquisitions were recognized. (Varishta, XVII. 51; Manu, IX. 206 to 209). Doubtless, as remarked by Mr. Mayne in section 395, the son's right to partition during the life of the father was very slowly recognized both before and after the establishment of English Courts, especially as regards ancestral moveable property. The decision of the Court of Appeal in *Jugmohandas Mangaldás* v. *Sir Mangaldás Nathubhái*[1] deals with the subject, treating as authority as to ancestral immoveable property the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad*,[2] where Sir J. Colville says:—"But it seems to be settled now in the Courts of the three presidencies that a son can compel his father to make a partition of ancestral immoveable property." As to ancestral moveables Sargent, C.J., after reviewing the authorities and the Hindu texts bearing on the question, comes to the conclusion that "no distinction between moveable and immoveable property can be satisfactorily drawn as regards the right of a son in an undivided family governed by the Mitákshara law to partition in the lifetime of the father."

By these interpretations of the ordinary law by the Court of Appeal, I am of course bound, although so eminent a jurist as Sir H. S. Maine in his "Early Law and Custom," p. 122, follows Mr. Nelson, the author of a "View of Hindoo Law" (p. 37), and "Indian Usage and the Judge-made Law in Madras" (p. 207), in holding that the texts do not "lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of the father." Dr. Jolly admits that these interpretations of the Courts may be strangely opposed to the strong sense of the deference due to elders, which pervades the Indian law and which was evident in many of the relations of the witnesses in this case. But his learned examination of the Sanskrit original of the Mitákshara texts induces him to conclude that Vijnáneswara establishes the right of the son to a partition of the ancestral immoveable property at least, at any time. Jolly's Tagore Law Lectures, 1883, pp. 111 and 125. Whether or not the ancestors

(1) I. L. R., 10 Bom. 528, at pp. 570-574. (2) L. R. 6 Ind. App. 88, p. 100.

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of the Khojás in Sind and Kutch before their conversion to Muhammadanism followed the Mitákshara law, the practice of enforcing partition against the father's will, as well as the opposing moral sentiment, belongs according to eminent scholars to the far earlier period of the Dharmasútras or "Aphorisms on the Sacred Law." The date of none of the Dharamsútras can be fixed by direct historical evidence, but their remote antiquity is sufficiently proved by the fact that they belong distinctly to the Vedic period of Sanskrit literature (Jolly's Tagore Law Lectures, 1883, p. 36). Dr. Jolly agrees with Dr. Buhler in treating the institutes of Gautama as the oldest of the existing works on the sacred law (p. 37), older than Baudháyana and Apastamba and long anterior to Manu and Yájnavalkya. The relation of the Sútras to the Vedic schools and the secondary Smritis, and the connection with the customary law are matters discussed by both these learned scholars. "In spite of the undue prevalence of the religious and scholastic elements which have stunted the growth of Indian law from the very outset, there is no reason to doubt that the legal rules of the Dharmasútras are based on a large superstructure of customary law." (Jolly's Tagore Law Lectures, 1883, p. 39) "Minute as the Dharmasútras generally are on the majority of the topics connected with the moral duties of Áryas, their arrangement of the rules is frequently unsystematic, and their treatment of the legal procedure, the civil and criminal law, with the exception of one single title, the Dáyavibhága, *i. e.* the law of inheritance and partition, extremely unsatisfactory. With respect to the other titles, the Dharmasútras give nothing more than a few hints, intended to indicate the general principles, but they never proceed systematically, and always show most embarrassing omissions. From the standpoint of the Vedic schools, a more detailed and orderly treatment of these matters was, of course, irrelevant, as their chief aim was to point out the road to the acquisition of spiritual merit, and to guard their pupils against committing sin. Though some of their members might be called upon, and no doubt actually were destined in later life to become practical lawyers, as Dharmádhikarins, *i. e.* legal advisers of kings and chiefs, or as judges, and to settle the law between man and man, the few

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general principles which they had learnt during the course of instruction would suffice for their wants. For the details were settled according to the law of custom, which, as the Dharmasútras themselves indicate, was in ancient times even a greater power in India than it is in our days." (Buhler's Laws of Manu, Introduction LIII) The rules of Gautama on the son's right to partition are thus stated by Dr. Jolly —"The Dharmasútra of Gautama, while declaring in one place (XXVIII. 2) the assent of the father as absolutely necessary to a partition by the sons, refers in another place (XV. 19) to sons who have enforced a division of the family estate against their father's wish. Such sons shall be excluded from funeral repasts, which shows that division against a father's wish, though not precisely illegal, was reputed *contra bonos mores*. This appears to have been the true feeling in the Smriti epoch about a partition enforced by the sons, and this feeling continued to subsist in spite of the important rights that were gradually accorded to the sons over ancestral property." (Jolly's Tagore Law Lectures, 1883, p. 99). "From this Sutra it would appear that sons could enforce a division of the ancestral property against their father's will, as Yájnavalkya also allows (see Colebrooke, Mitákshara I, 6, 5-11), and that this practice, though legal, was held to be *contra bonos mores*." Bühler's Gautama, p. 255. The text of Gautama (XV. 19) excluding from the funeral feasts is thus translated by Dr Buhler. "Nor (sons) who have enforced a division of the family estate against the wish of their father." Sir H. S. Maine differs from Dr. Jolly and Dr. Bühler in their view of the meaning. He writes, "There are a few texts which have been thought to imply that the son of an aged father could compel his retirement. Gautama (XV. 19), while condemning such a practice, perhaps admits its existence But, whatever be the meaning of these texts, I cannot allow that they lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of their father. I regard them as exclusively applying to the case of a father who has reached an age at which it has become a religious duty for him to abandon secular life. The fulness of the ancient Hindu *Patria Potestas* may be safely inferred from the veneration which even a living father must

have inspired under a system of ancestor-worship" (Early Law and Custom, p. 122). But, as the same learned writer admits, there were causes operating from an early time which tended to dissolve the family.

The causes whereby partition grew into a practice are manifold. The advocacy of partition as a means of acquiring spiritual merit is as old as Gautama. (See Mayne's Hindu Law, s. 216). But the motive which induces a man who earns more wealth than his brethren to get rid of their claims on his industry has also operated in all advancing societies and, as Mr. Mayne supposes, earlier than the desire of spiritual merit. In pointing out the close resemblance of the House Community of the South Slavonians to the Joint Family of the Hindoo in a most suggestive chapter of his "Early Law and Custom," Sir H. S. Maine remarks at p. 252 on the causes and effects of the recognition of separate property—"The *peculium* seems to be always an actively dissolving force. It had this effect to some extent with the Romans, but with the Hindoos it is the great cause of the dissolution of the joint families." "The adventurous and energetic member of the brotherhood is always rebelling against its natural communism. He goes abroad and makes his fortune, and strenuously resists the demand of his relatives to bring it into the common account. Or perhaps he thinks that his share of the common stock would be more profitably employed by him as capital in a mercantile venture" (p. 264). "Where, as in Turkey, the local usage is left to its unchecked operation, one of the systems of succession commonly followed has a great deal of interest for us. Each son of the family as he grows up and marries leaves his father's household, taking with him the share of its possessions which under developed law would have devolved upon him at his father's death and he goes elsewhere, often into a far country, to seek a new fortune" (pp. 259-260 ?) These informal divisions are mentioned by Mr. Nelson as common now-a-days: "It is an undoubted fact that year by year thousands of so-called Hindu families resident in the Madras Province are in effect permanently broken up by one or more members going to a distant place or to distant places, he or each of them hoping to make a fortune for himself solely." (View of Hindoo Law, p. 37).

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These general observations help to explain much of the recorded evidence. Sometimes too when the property is small, the son seems to go out with a nominal share, or such an amount as the other members were willing to part with (Cf. Mayne's Hindu Law, s. 217), to which the wife's ornaments or *peculium* is often added. Witness 23 states that a Khojá often takes a portion of the family property and sets up for himself. It has not been necessary to investigate the facts, but there are indications that the son so departing and starting a separate trade does not as a rule account to his brethren left behind, whereas he sometimes gets a share of the family property on the father's death. Another cause of partition very evident among Khojá families is the second marriage of the father, an event treated as of great importance in the Thesawalame and in the Buddhist versions of the Mánava Shástar followed in Burmá. The sons, grown up and assisting the father in the business, cannot brook the interference and influence of the step-mother; their share in the property is diminished as new children are born, while the father and the step-mother, perhaps afraid that the new family may be left orphans, are naturally anxious to provide for them out of the estate, a share which the elder sons are inclined to think more than is due. The quarrels among the women seem also to be a very common cause of separation; and probably these homely causes, as well as the fear of the father wasting the property, have operated from one generation unto another. It may also be the fact that the Muhammedan religion and habits as well as the spirit of commercial enterprize and the frequent emigrations among the Khojás have been more effectual and for a longer time in sapping the sentiments which uphold the joint family and the paternal headship than among the Hindoos.

The above investigation, tracing what has now become the rule of Mitákshara law to a practice close upon the Vedic period, seems to me to invalidate Mr. Starling's learned argument that there are antecedent reasons for presuming that the Khojás excluded it in favour of the opposing rule of conduct. The respect for parental authority may have kept down the number of enforced partitions and a corresponding feeling on the father's

part may have caused great reluctance and delay in giving the son a share, but as Mr. Justice Scott argues in *Jugmohandás Mangaldás* v. *Sir Mangaldás Nathubhoy*, if a custom against partition had existed as the customary law of these ancient Hindoos, why did not the father avail himself of it? and I may ask, why was it necessary to express moral disapproval if the father's legal right could be asserted?

Mr. Justice West (West and Bühler's Hindu Law, pp. 659, 660, 3rd Ed.) mentions however among the many exceptions to the Mitakshara law which arise from the caste law of the parties that "amongst 82 of the 101 castes, from whom information was obtained by Mr. Steele at Poona, it was found that partition could not be enforced by a son against his father unless the father had acted improperly as manager. It would seem therefore that in the usage of a large minority, at least of the people of the Dekhan, the rule of Baudháyana is still received as law. 'While the father lives the division of the estate takes place (only) with his permission' In Gujaráth the castes, almost without exception or qualification, answered Mr. Borradaile's inquiries by denying the right to partition of a son against the wish of his father. Uniformity of the law is so desirable that the Courts will naturally desire to abide by the Mitákshara and the Mayukha, whose doctrine has been adopted by the Judicial Committee (*Suraj Bunsee Koer's Case*[1]), but it is only fair to point out that custom does not appear to have more than partially accepted these authorities on the point now in question. On the one side are the Shástris whose opinions are entitled to respect; but on the other are the answers given by the representatives of the castes themselves." With reference to these remarks Mr. Jardine has suggested that however carefully Mr. Borradaile may have done his work, the persons consulted were probably the elderly and rich members of the castes, who were likely to be biassed by their position, and to be reluctant to go against the general feeling, especially as their doing so would suggest to their sons that they might make claims. Judging from the way witnesses make statements about custom, it may, I think, reasonably be supposed that the heads of castes sometimes gave

(1) L. R., 6 Ind. App. at p. 100.

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mere opinion without reference to facts as in the matter of adoption among Jains, *Bhagvándás* v. *Rájmal*[1] or from their not having heard of one of the rare instances as in *Jugmohandás Mangaldás* v. *Sir Mangaldás Nathubhoy*[2] or from their wish to establish a conformity with religion as in *Mahomed Sidick* v. *Háji Ahmed*.[3]

The authorities quoted in an earlier part of this judgment establish clearly that the burden of proving a special custom lies on the party alleging it, although in *Hirbái* v. *Gorbái*[4] less stringent proof was required than in ordinary cases, Sargent, J., considering it sufficient if, in the language of the Jurist Thibaut, "a majority, at least, of the community look upon the rule as binding, and it be established by a series of well known, concordant, and, on the whole, continuous instances." It is, I think, open to argument whether in the present case where the special custom is alleged to be the Hindu law at another and older stage this rule of proof is applicable. The defendant seeks a modification of the ordinary Hindu law of Gujarát and the Island of Bombay, *viz.* Manu, the Mayukha and the Mitákshara. *Lallubhái Bapoobhái* v. *Mankuvar bái*,[5] *Sakhárám Sadáshiv A'dhikári* v. *Sitábái*,[6] *Murárji Gokuldás* v. *Párvatibái*,[7] and if the parties were not Khojás but Jains or other Hindus, he would have under the ruling of the Privy Council in *Rámálakshmi Ammal* v. *Sivánántha Perumal*[8] to prove by clear and unambiguous evidence that the special usage is ancient and invariable. See also *Shidojirár* v. *Náikojirár*[9] and *Bhagvándás Tejmal* v. *Rájmal*.[10]

In the present case there is a large quantity of evidence of the usual varieties, opinions, acts, acquiescences and interferences. In dealing with it I will adhere to the less stringent rule of proof applied in *Hirbái v. Gorbái*.[11] Many witnesses have been examined and many documents filed; and I will now approach the discussion of this evidence. In weighing the testi-

(1) 10 Bom. H. C. Rep., 241, at p. 263.
(2) I. L. R., 10 Bom., 528 at p. 542.
(3) I. L. R., 10 Bom. 1 at p. 14.
(4) 12 Bom. H. C. Rep., 294 at p. 317.
(5) I. L. R. 2 Bom. 388 at pp. 418, 419, 420.
(6) I. L. R., 3 Bom., 353.
(7) I. L. R., 1 Bom., 177.
(8) 14 Moo. I. A., 570.
(9) 10 Bom. H. C. Rep., 228.
(10) 10 Bom. H. C. Rep., 241.
(11) 12 Bom. H. C. Rep., 294.

mony of witnesses the Court has to proceed with caution because the Khojá community in both its Shiá and Súni sections some years ago applied itself to consider what its law about inheritance, partition, marriage and other matters ought to be, and a commission whereof the late Sir M. Melvill, when a Judge of this Court, was President and Ali Agá Sháh, Mr. Spencer, a Judge of the Small Cause Court, Mr. R. M. Sayáni, Mr. Dharmsi Punjábhái, Mr. Jairájbhoy Peerbhoy, and the defendant were members, considered a project of law which was to be submitted to the Government of India with a view to legislation. This proceeding has evoked a number of expressions of opinion and has been in some ways tantamount to a rehearsal of the questions of Khojá custom which I have to decide. The statements of such people as witness 15 (see also Exh. A. 38) show how little unanimity of opinion exists on many questions. These facts add I think to the relative weight to be given to wills, deeds, and other formal acts of Khojás, falling within an earlier period, and for this reason and because the examination of this part of the evidence will furnish some test of the oral testimony as in the examination of witness 15 about Kásim Nátha's disposition of property. I will take it first in appraising the evidence as to the alleged customs. The absence of documents disclosing uncontrolled dealings with property on the part of heads of families has been commented upon for the plaintiff; and this argument is met for defendant with the observation that disherison is a very uncommon circumstance in any community and such documents are therefore uncommon. (His Lordship then discussed the evidence of usage given by the defendant, and continued).

I have now discussed all the various evidence whereby defendant seeks to prove the existence of usages modifying the ordinary Hindu law. I do not think that it proves that the father may dispose of ancestral property with the same freedom and indifference to the rights of undivided sons as in the case of self-acquired property. No will nor conveyance has been produced which purports so to do; whereas several wills recite that the property bequeathed is self-acquired, and the ordinary language of the Khojás is proved to contain words and phrases indicating

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the distinctions so well known to the Hindu law. Where unequal distributions are proved to have been made, in some cases there was no ancestral property, or none was proved to exist; in others where there was ancestral property, the excluded son is proved to have acquiesced, or joined, in the special mode of distribution, after consultation; in others this concurrence may easily be inferred. Sons often wish to do the right thing, and do not trouble themselves about their strict rights at law, which they are willing to waive when the mother's comfort or the maintenance of younger brothers is concerned, and especially if the father expresses his wishes. The Court cannot infer that no right exists when under special circumstances it is not exercised, or a special contract is made. The case of witness 69, the son of witness 5, is that of a son who has become so wealthy that he does not care to enforce partition. No perfect instance of deliberate claim to partition finally refused has been proved. A great number of cases of alleged turning out of sons have been brought forward, in order to induce the Court to draw the inference that if the son had had any right to claim partition he would have made a claim on being turned out. In many of these cases there was no ancestral property proved, and therefore they are not in point. In many others the expression "turning out" was a misuse of language; where, as in the cases of nine sons what happened was their setting up in business, and in those of three or four more the change to a separate abode or a relation's house added to their comfort. Several of the "turned out" sons are on the best of terms with their fathers, and it does not appear that they usually are disinherited; rather, that they get a share on the father's death. Some of them were disobedient sons, in whose favour those elderly or respectable gentlemen who compose the Jamát were not at all likely to interfere on social or moral grounds. If maintenance was claimed, the action of the Jamát in refusing aid to such children might perhaps be justified by the considerations mentioned by Mr. Justice Pinhey in *Rámchandra S. Vágh* v. *Sakhárám G. Wágh*(1) (See too West and Bühler's Hindu Law, p. 583 (3rd ed.). I am, for these reasons, of opinion that the so-called turnings out do not afford ground for

(1) I. L. R. 2 Bom. 346.

inferring that the sons knew they could not claim partition from the father of the ancestral property. The evidence does not appear to me to satisfy Thibaut's rule about proof of custom. It does not seem that a majority looks on the alleged special customs as binding, or that the instances have been well-known, concordant, and continuous.

The evidence given on behalf of plaintiff has now to be examined. It appears to me to negative the existence of the special customs set up. Plaintiff has not given much evidence as to the customs at Bombay. Witness 67 deposes to a partition enforced by a son against the will of the father, the property being self-acquired. Witness 59 tells of a partition in the family of one Rajan, but as his account differs from that of Sundarji, witness 65, I hold the proof to fail Witness 55 deposes to several partitions among Bombay Khojás at places in the Persian Gulf. I attach no weight to them, as he is contradicted by plaintiff's witness 78, and as it is likely enough that what may have occurred were only dissolutions of partnerships. Ex. 88 is a formal registered document of 1879, in Maráthi, whereby Abdulá, the son of the witness 53, a Khojá of Málad, in the neighbouring island of Sálsette, in consideration of property given to him, his wife, and his son, by witness 53, relinquishes all right to the remaining joint ancestral and self-acquired property and future acquisitions. Witness 53 has not heard of ancestral property being alienated away from the son in a Khojá family, but he professes ignorance of the legal question involved, and says he yielded a share to Abdulá, a bad fellow, through fear of his otherwise doing him serious injury. Now, though he may have been glad to get rid of him, it is doubtful whether he would have given him a share, unless he thought partition were compellable, the fact at least remains that the son induced the reluctant father to give him a share. Witness 71, Gángji, whose family comes from Sinugara, near Anjar, in Cutch, deposes to one of the sons of his relation, Hasam Chakpal, obtaining partition of property in Bombay; but this property had been earned in a trade in wood which the sons, as well as the father, carried on. There is no reason to suppose it

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was ancestral; but witness 63 confirms this witness as to Hasam having inherited houses and other property in Cutch. It may have been joint property. Most of the instances of partitions enforced by sons, on which plaintiff relies, are alleged to have occurred in the kingdom of Cutch, and in the different principalities of the Káthiáwád peninsula. Many of the Khojá families in Bombay have migrated from those regions: many still keep up a connection with them. Defendant's family was settled a few generations back at Bhávnagar. Some of the partitions in evidence took place among the peasants, or petty craftsmen in quiet rural districts: in others, more or less family connection with Bombay had begun; but, as a rule, these families are in different circumstances to those of the Bombay Khojás, whose mercantile enterprise opens up great businesses with places far across the seas, like Zánzibár or Hongkong or Bandar Abbás, where branches of these wealthy firms are started and new trading colonies begin. The change of circumstances producing different needs, and the contact with other communities and customs doubtless produce variations in dealings with family property, independent of the special contracts where convenience often varies the general rule. The evidence also relates to the acts of several generations. But it discloses, speaking generally, the existence of old institutions; even to this day the Khojás dwelling under the Darbárs of Cutch and Káthiáwád have suffered less interference of Courts and law than the Khojás in Bombay. The feudal landowner, the headmen of the village and the authorities of the Khojá community, all appear as influencing and determining the settlement of disputes about partition. Thus the Court has better material than the hypothesis of a form of Hindu law more archaic than the Mitákshara for determining what constraining notions about the power of disposal of property the Khojás of Bombay brought from their ancient homes. The defendant wished for a Commission to examine witnesses in those principalities, but did not press the application. A number have been called, some for defendant, many for plaintiff, and examined in Court, where the long and rather tedious cross-examinations enabled me in several instances to estimate to a certain extent their demeanour and

animus. I will first take the cases occurring in Cutch. [His Lordship examined the evidence of custom in Cutch and Káthiáwád and proceeded].

Having set forth the evidence produced by plaintiff, I must state my conclusion, which is that the opinions given and instances proved combine to show that the customs of the Khojás as to partition of ancestral property are substantially identical with the ordinary Hindu law, as might have been expected seeing that in other matters this identity has already been affirmed by decisions of learned judges passed after inquiry into the facts. Nearly everything trustworthy in the evidence admits of explanation by ordinary Hindu law. By the partition of so-called "self-acquired" property in the families of small traders and cultivators was probably meant that of accretions by the joint family of the patrimony, to which *Umrithnáth Chowdry* v. *Gowrináth Chowdry*[1] applies See, too, West and Buhler's Hindu Law, p 723, 3rd Ed.). The use by a co-parcener of part of the joint funds for his own profit, the gift within moderate limits of a sum sufficient to start a son in business, the segregation of a share advanced for a like purpose, the provision at partition of maintenance, or a share for the father and mother are matters familar to students of the Hindu law. We shall have to inquire later how far the conduct of Hubibhoy in proposing to settle his property on his sons, contenting himself with a maintenance, and in afterwards awarding shares to two of them and taking releases from them, and thereafter describing them as separate and devoid of interest in his estate is explainable in the same way

The conclusion at which I have arrived after much consideration of the evidence and arguments is adverse to defendant's contention about custom in the present case. But I have the satisfaction of knowing that it follows a long current of judicial decisions, and that it coincides with the views defendant solemnly expressed in the affidavits of 1870. The ordinary rule of Hindu law which he, a member of a leading family, then wished to be treated as the custom of the Khojás in Bombay, is now proved to be the rule followed also by those who have

(1) 13 Moo. I. A., 542

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remained in Kutch and Káthiáwád. The well-known distinction of Hindu law between ancestral and self-acquired property in respect to power of alienation is affirmed by a great number of the witnesses as accepted by the Khojás, while those who testify that no such distinction exists fail to prove instances indicating an unlimited power of disposal. In many of the partitions proved to have occurred in Kutch and Káthiáwád the father did not assent to the claim of the son until after some pressure had been applied. In others, the witnesses, who are candid enough, state that there was willingness on the part of the father to assent to the son's claim. But, as a rule, these witnesses say clearly that the son has a right to make the claim, and so say some of the Bombay witnesses. I am therefore of opinion on this evidence that the consent of the father, whether given reluctantly or willingly, is given under the impression that he consents not merely to exercise an option or to do what he merely ought to do, or what it may be convenient or courteous to do, but to what the son may enforce him to do. "Thus by frequent iteration and multiplication of the act a custom is constituted, and, being used for a time, obtains the force of law." (Case of Tanistry, Sir J. Davys's Rep. at p. 32, quoted in Mr. Justice West's Note to *Mathurá Náikin* v. *Esu Naikin*).[1] The result of the foregoing consideration of the case is that I find on the questions of law and custom in favour of the plaintiff, the special customs contrary to the Mitákshara law not being proved, but customs conformable to that law being shown to be followed by the Khojás.

The Court has now to turn to the more difficult question whether the wealth which Hubibhoy left by will to defendant had been acquired by means of a nucleus of property inherited by Hubib from his father Ibráhim. The evidence extends over four generations I will take it as nearly as possible in order of time. [His Lordship stated the evidence and proceeded].

Before discussing *seriatim* the value of this evidence on the points, whether Hubibhoy received property from his father Ibráhim, which became ancestral in his hands, and whether this

[1] I. L. R. 4 Bom. at p. 573.

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property was the *nucleus* of the fortune Hubibhoy bequeathed to defendant, it will be convenient to refer to the rules about burden of proof and the cases establishing them. For reasons already given, I start with the conclusion that in the matters under discussion the Khojás are in substantially the same circumstances as the Hindus. There being no evidence nor suggestion that Hubibhoy ever made partition with Ibráhim, it must be presumed that up till Ibráhim's death they two lived in joint family, *Nilkristo Deb Barmano* v. *Bir Chandra Thákur*(1); *Taruck Chander Poddár* v. *Jodeshur*(2), and that the whole of their property was joint, even though purchased in the name of one member (*Gopekrist Gosain* v. *Gungápersád Gosáin*(3)) or acquired jointly in trade, *Rampersád Tewarry* v. *Sheochurn Doss*(4), and when not bequeathed by will (and there is no suggestion that Ibrahim made a will) became ancestral in the hands of Hubibhoy. *Jagmohandás Mangaldás* v. *Sir Mangaldás Nathoobhoy*(5); *Mahomed Sidick* v. *Haji Ahmeda*(6); *Chatturbhuj Meghji* v. *Dharmsi Náranji*(7). See also West and Bühler's Hindu Law, pp. 709, 710, 716, 717, Ed. 3rd, and Mayne's Hindu Law, sections 248 and 249. In the present case the defendant denies that the property to which the suit relates is ancestral, and that the plaintiff has any estate or interest therein. His case as unfolded in evidence and arguments, is that Hubibhoy received no property from Ibráhim, which became the *nucleus* of Hubibhoy's wealth. I have not been able to find any authority dealing with the question of *onus* at the exact point we have reached; but having come to a conclusion on the issues about special custom, and having now to deal with evidence recorded, I do not think this question of much importance. Following Mr. Mayne's reasoning in section 263, I think there was *onus* on plaintiff to offer evidence; but that the amount of evidence to shift upon defendant the burden of displacing it depends upon the particular circumstances, and that the duty of the Court is the ordinary duty of coming to conclusions on the evidence. The discharge of that duty in the

(1) 12 Moo. I. A., 540.
(2) 11 Beng. L. R., 193.
(3) 6 Moo. I. A., 53.
(4) 10 Moo. I. A., 490.
(5) I. L. R., 10 Bom., 528.
(6) I. L. R., 9 Bom., 1.
(7) I. L. R., 9 Bom., 438.

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present case is more than usually difficult, as Ibráhim died in 1816 and Hubibhoy died in 1865. There are few witnesses remaining who can speak to the transactions of 1850 and 1844, and hardly any to those of 1820 and the time before then. The account books are few and defective. For these reasons I will give my reasons with some fullness for the conclusions to which the evidence has led me. [His Lordship discussed the evidence and continued].

For the above reasons I find in favour of plaintiff as to the nucleus of the fortune bequeathed by Hubib to defendant having been inherited from Ibráhim. My findings on the issues are as follows:—On issues 1 and 8.—The property in the hands of Hubib Ibráhim and devised by his will was ancestral property and the profits thereof. On issues 2 and 3.—The plaintiff at birth became a co-parcener in the said property, with an interest therein, similar to that of a son in a family governed by the ordinary Hindu law and retain such an interest until partition. On issue 4.—The said property is not the sole and absolute property of the first defendant. On issue 9.—There is a distinction between ancestral and self-acquired property by the law and custom of Khojás in respect of the power of the owner thereof to devise or make a gift of the same, such distinction being similar to that obtaining at ordinary Hindu law. On issue 5.—Hubibhoy Ibráhim's will, dated the 29th December, 1864, did revoke all prior testamentary writings made by him. On issue 6.—Such revocation was not procured or induced by any promise or representation of defendant 1 to the said Hubibhoy Ibráhim as alleged in para. 7 of the plaint. On issue 10.—I pass no finding, but refer it to the Commissioner for Taking Accounts. On issue 7.—The relief due to plaintiff is a decree for account and partition of his share after a reference to the Commissioner. It is not disputed that defendant's family consists of himself, the plaintiff, and the second defendant. Plaintiff is thus entitled to one-third share, and the two defendants each one-third share. I direct that the decree contain the following words:—That it should be referred to the Commissioner to take an account of the ancestral property, both moveable and immoveable, which has come into the possession of the first defendant, and of the

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accumulations and accretions thereof, and to ascertain and report the amount of the said ancestral property with the said accumulations and accretions, which is now in the hands of the said first defendant, and to ascertain the amount of the plaintiff's one-third share therein, and also to ascertain the amount of the second defendant's one-third share therein. I order the first defendant to pay all the costs of the suit up till date; order as to subsequent costs reserved.

Attorneys for the plaintiff —Messrs. *Ardesir, Hormasji*, and *Dinshá*.

Attorneys for the defendants:—Messrs. *Jefferson, Bhálshankar*, and *Dinshá*, and Messrs. *Thákurdás, Dharamsi*, and *Cámá*.

ORIGINAL CIVIL.

Before Mr Justice Scott

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December 12.

IN RE THE MACHINE EXCHANGE COMPANY, LIMITED, IN LIQUIDATION.

RUSTOMJI FRA'MJI WA'DIA'S CASE.
SHA'PURJI BYRA'MJI KA'TRUCK'S CASE

Company—Memorandum of Association—Effect of signing Memorandum—Withdrawal of signature before registration of memorandum—Indian Companies Act VI of 1882, *sec* 45.

A person who signs a memorandum of association for a number of shares becomes absolutely bound to take those shares The statutory liability, the creation of the agreement commences with the signature of the memorandum and is not held in suspense until the memorandum is registered There is no *locus pœnitentiæ* up to the date of registration, and no person who has signed the memorandum can, acting independently of the others, cancel his signature.

IN the winding up of the above company which had been registered on the 18th January, 1887, the Official Liquidator (Mr. T. Lidbetter) now brought in the list of contributories for settlement.

Rustomji Frámji Wádiá was entered on the list as the holder of forty shares and Shápurji Byrámji Katruck as the holder of thirty shares. Both the said contributories had subscribed the

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registered memorandum of association for the number of shares mentioned in the list.

Rustomji Frámji Wádiá, however, disputed his liability save as to five shares, on the ground that on the 17th January, 1887, the day before the company was registered, he wrote to the agent of the company, Mr. Drewett, withdrawing his subscription as to thirty-five of the forty shares for which he had subscribed his name. The following is a copy of the letter alleged to have been written :—

"*19, Church Gate Street,*
Bombay, 17th January 1887.

To

T. DREWETT, Esq.,

Agent, Machine Exchange Company, Limited, Bombay.

DEAR SIR,—Referring to the forty shares subscribed by me on the understanding that the amount of five shares will be paid by me and that of thirty-five shares will be paid by yourself on your own account, I have taken legal advice thereon, and I am advised that I shall be held responsible for thirty-five shares also in case you decline to pay the amount thereof. I therefore beg to return the guaranteed letter regarding those thirty-five shares to you, and request that you will enlist my name as subscriber for five shares only and no more. I take this opportunity to write this at once, inasmuch as the Company is not yet registered. If notwithstanding this timely intimation you choose to keep my name as a shareholder for forty shares, you will do so at your own risk and peril."

To that letter he alleged he received the following reply :—

"*27, Apollo Street, Fort,*
Bombay, 17th January, 1887.

RUSTOMJI FRÁMJI WADIÁ, Esq.,

19, Church Gate Street.

DEAR SIR,—I am directed by Mr. Drewett, the agent of the Machine Exchange Company, Limited, to acknowledge the receipt of your letter of the 17th instant, and in reply I am directed by him to inform you that, as desired by you, your name will be entered into the Register book of shareholders as holder of five

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shares only and the rest are cancelled I am also directed by him to inform you that he was glad that before the company was registered you sent him a timely notice to enable him to enter your name for five shares only, otherwise he would have been obliged to pay to the company the amount for thirty-five shares. "Yours truly,

(Signed) RÁMCHANDRA SUNDARJI,
Accountant."

The agent of the company (Mr. Drewett) denied that he had ever received the above letter of the 17th January, 1887, from Rustomji Frámji Wádiá or had authorized the alleged reply to be written

The second of the abovementioned contributories (Shápurji Byrámji Katruck) admitted that he had first subscribed for thirty shares, but alleged that on the day before the company was registered (*viz.* on the 17th January, 1887) he had withdrawn his name in respect of twenty of the said shares and allowed it to remain for ten shares only. The following was his letter to the agent of the company :—

T. DREWETT, Esq., *"17th January, 1887.*
Machine Exchange Company.

DEAR SIR,—Unavoidable circumstances compel me to withdraw the number of shares (30) that I have put down on Saturday last in the proposed Machine Exchange Company, Limited.

I have no objection to your keeping ten shares in my name for the present. Yours faithfully,

(Signed) SHÁPURJI BYRÁMJI KATRAK."

The agent of the company swore that he did not receive that letter until the 18th January two hours after the company had been registered.

Farran for the Official Liquidator :—As to Rustomji Frámji Wádiá's case, we deny that there was any letter of withdrawal written or received. As to Shápurji's case we say there was no withdrawal before registration. After the memorandum of association is signed there can be no withdrawal; Indian Com-

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panies' Act (VI of 1882), sec. 45, *Buckley on Companies* (Ed. 4th), p. 41, *Drummond's Case*(1). The contract was complete either with the proposed company or with all the other signatories of the memorandum of association, *The Guzerát Spinning and Weaving Company* v *Girdharlál Dalpatram*(2), *Duke's Case*(3).

Lang for Shápurji Byramji Katruk:—My client is liable only for ten shares. The signature does not bind until the memorandum of association is registered. There is no company until registration; *Duke's Case*(4). If there is any contract it is a contract with the other signatories who may possibly be entitled to bring a suit against us But we contend that before registration the memorandum of association is a mere agreement from which we can withdraw without the consent of the other subscribers, *The Guzerát Spinning and Weaving Company* v. *Girdharlál Dulputram*(5).

19th December 1887: SCOTT, J.—These claims are brought by the liquidator of the Machine Exchange Company to place Shápurji Byrámji Katruk and Rustomji Frámji Wádiá on the list of the contributories of that company, and as regards the shares for which they subscribed the memorandum of association. The company was registered on 18th January, 1887, and wound up this year.

This case involves two questions: one of law and one of fact. I propose to deal with the point of law first. The signatories of the memorandum of association are held liable under the Indian Companies' Act (section 45) which is as follows:—"They shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and," the Act goes on to say, "shall be entered as members on the register of members when the company has been registered." This section is taken *verbatim* from the English Act, and a long series of English decisions has decided that when a person signs a memorandum of association for any number of shares, he becomes absolutely bound to take those shares. All these cases, which are collected in *Drummond's Case*,(5) show conclusively that

(1) L. R., 4 Ch. App., 772.
(2) I. L. R., 5 Bom., 425.
(3) L. R., 1 Ch. Div., 620
(4) I. L. R., 5 Bom., 425.
(5) 4 Ch. App. 772.

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it is the act of signing the memorandum which establishes the liability for the shares subscribed for. Buckley, p. 42, says, "The subscriber is liable by virtue of the contract, which, under this section, arises immediately upon his signature."

But it was argued that the liability was inchoate as long as the company was not registered. Let us examine whether that reading is in accordance with the letter and spirit of the section. It must be remembered that these company Acts were framed with a view to protect the public against the dangers of the limited liability system. The spirit of this particular provision is expounded by Lord Romilly in *Drummond's Case*[1]. "The persons signing the memorandum are required by the Legislature to do so as an earnest that there are certain persons personally liable to pay money to the company." They are, in short, guarantors of the *bonâ fides* of the company. As Giffard, L.J., says:—"A man who signs the memorandum of association agrees to become a shareholder, and as long as there are shares that can be allotted to him he must fulfil that obligation." Mr. Lang argued there was a *locus pœnitentiæ* up to registration. He cited in support of his argument the dictum of Sir George Jessel in *Duke's Case*[2]. But that dictum, read with its context, tells against the contention, not for it. "Before registration," says the learned judge, "the contract contained in the memorandum may be varied, or rescinded or modified." But he goes on to explain the kind of variation that is permissible. "The Act," he says, "does make the memorandum irrevocable as regards the amount of capital subscribed for, but it does not say that if the memorandum contains any other particulars they may not be varied." There must, of course, be some ascertained person or body of persons with whom a contract is made before it can be binding and complete. The only body of persons in existence who could be parties to this contract before registration are the seven or more subscribers, and the effect of the section is that no one person acting independently of the others can cancel his signature. Whether all by agreement could do so is a question it is not necessary to consider, as such a step would destroy the proposed company altogether, and the question of the protection

(1) 4 Ch. App. 772 at p. 776 note. (2) L. R. 1 Ch. Div., 620 at p. 623.

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of the public, which is the object of the Act, would not arise. The literal meaning of the section is clear. The words "shall be deemed to have agreed to become members," read with the succeeding words, "on registration shall be entered on the register of members," bear only, to my mind, one construction. The statutory liability, the creation of an agreement, commences with signature of the memorandum, and is not held in suspense until registration. The context of the Act shows clearly that the subscribers of the memorandum are a body with a status before the registration. Sections 6—8 and 41 all show this. By section 6, which lays down the mode of forming a company, any seven persons may form a company by (*a*) subscribing their names to a memorandum of association, and (*b*) by otherwise complying with the requisitions of the Act. The subscription is the first step. By section 8 it is laid down that each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes. By section 11 it is provided that, when the memorandum of association is registered, it shall bind, not only the subscribers who are specially dealt with by section 45, but also the company and its members, as if each member had subscribed his name thereto. This implies an antecedent liability, so far as concerns the subscribers. Section 41 deals with registration of the memorandum of association; and declares its subscribers, together with the other members of the company, to be, after registration, a body corporate. Finally, section 45 creates two distinct obligations; one which has force from the moment of subscription, the other which comes into force on registration. The subscribers of the memorandum, it says, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, that is the first obligation imposed upon them by the Act. They have *agreed* to become members. The use of the word "agreed" shows that the Legislature implied a promise which means in law a proposal and an acceptance and the creation of a *vinculum juris*. The provision was made for the protection of creditors and shareholders, and the promiser cannot repudiate the liability it creates. An agreement is clearly intended, and it must be presumed, as I said before, that the Legislature, with the

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intention of protecting the public, bound the subscribers one to another, and closed the door of withdrawal upon them after subscription.

Now if this is a fair statement of the law, it seems to me impossible to argue that the section leaves a *locus pœnitentiæ* to the subscribers up to the time of registration. But I need not go so far for the purposes of this case. Even if there were a *locus pœnitentiæ*, and if the case the parties here set up were true, they would be no better off. They asked that their names should be removed, but they did not remove them. They notified their wish to Drewett, who could have no implied authority from the proposed company, and certainly had no actual authority from the other signatories to remove the names or reduce the amounts. The defendants treated him as agent for their withdrawal; he failed to carry out their orders; the names and amounts remained and were registered, and from that time forth the liability of the defendants is beyond a doubt. They had merely a right to sue Drewett for negligence, and their only way of getting rid of their liability was to take the shares and then make a valid transfer. "Upon the authorities, it is clear," says Mr. Justice Kay (*In re Argyle Coal and Cannel Company Limited, Ex-parte Watson*[1]) "that a person who had signed the memorandum could not get rid of his liability as a shareholder except by means of a legal transfer of his particular shares." I may add that as regards Shapurji's liability the case is still stronger against him. He was a director, and as a director he was bound to put himself on the list for the number of shares for which he had subscribed. (*Hall's Case* [2].)

In my view of the case it is hardly necessary to deal with the question of fact, but as Judge of First instance it may be useful to do so. As to Shapurji Byramji Katruck's case. No doubt he signed the memorandum of association for thirty shares. But he says he wrote withdrawing his signature as regards twenty of the shares on the 17th January last, the day before the registration of the company. In point of fact there was no withdrawal of twenty shares before registration. Mr. Drewett, to whom the

(1) Times' Reports, Vol. II, p. 213 and see 54 L. T. N. S. p. 233.
(2) L. R. 5 Ch. 707.

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letter was addressed, the managing director, says he did not receive the letter till after he had registered the company. Mr. Woolley, the head clerk, fully confirms the statement. I may add that Mr. Woolley gave his evidence in both cases well and fairly, and Mr. Drewett, though he hesitated, did not impress me unfavourably. Mr. Shapurji says he saw Mr. Drewett on the evening of the 17th, when the withdrawal of the 20 shares was discussed. Mr. Drewett admits such a conversation, but says it was a few days after, not the day before the registration. Mr. Shapurji says he despatched his letter at ten in the morning, but his peon says it was not delivered till 1 p.m., although the peon further says it was an urgent letter for immediate delivery. I think, on the whole, the balance of evidence is in favour of Mr. Drewett's story that he never received the letter till next day.

As to Rustumji Frámji Wadia's case. Mr. Wadia says he also wrote on the 17th to withdraw his name as regards thirty-five shares, having subscribed for forty, and he swears that the same day he received a letter from a clerk who signed on behalf of Drewett accepting the withdrawal. Mr. Drewett repudiates the letter of withdrawal altogether. It is important to bear in mind, whilst weighing the evidence, that Mr. Wadia never raised this defence until he made his affidavit in reply to the liquidator's demand that he should be placed on the list of contributories for forty shares. On Drewett's side, Woolley denies that he saw any such letter of withdrawal. He says the clerk in question had no authority to sign and send out any letter accepting a withdrawal of shares. As a matter of fact there is no letter signed by the clerk in the letter book between January and April, although there are many before and after and after these dates. Woolley further says, and this is most important, that a notice of call was sent to Mr. Wadia in March. Mr. Wadia denies that he received the notice. But the letter delivery book puts it beyond doubt that such a notice was sent out by a messenger in the ordinary course of business; and it is also clear that a similar notice was not only sent, but received by Mr. Shapurji, who occupied the same floor and did the same business as Wadia. It is also clear that no letter came from Wadia repudiating his liability on the call on forty shares. Rámchandra, the clerk, says

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that he spoke to Mr. Drewett about the call notice to Wadia, but he did not say it was actually kept back, and the letter delivery book shows that the call notice was, as a matter of fact, sent out to all seven signatories of the memorandum, including Wadia. It must be remembered that Rámchandra, was formerly in Wadia's service, and is so now. As regards the letter of repudiation of the 17th January, it is supported by the evidence of the solicitor's clerk, who says that, after giving some legal advice, he drafted such a letter for Wadia; and another witness says he made a fair copy of the draft. But the date is not clearly assigned to this drafting and copying, nor is there distinct proof that the letter was sent. On the whole, I do not think the receipt of the letter of repudiation and the sending of the reply have been proved. I may add that this decision does not impugn the truthfulness of the evidence of the solicitor's clerk. All I decide is that the letter of repudiation and letter of acquiescence were not respectively sent and received as alleged.

My judgment may be thus summed up:—(*a*) Shapoorji and Wadia were subscribers of the memorandum of association for twenty-five and forty shares respectively. (*b*) They did not notify their withdrawal from twenty and thirty-five shares respectively before registration. (*c*) If they did notify the withdrawal, it was to an agent who had not authority to cancel the subscription. (*d*) Even if they had cancelled the subscription, they would have been still liable as the Act binds them from the moment of subscription. (*e*) At any rate, it is settled law that they are liable as subscribers of the memorandum whose names appear there at the date of registration. They must therefore both be placed on the list of contributories for the amount they subscribed for.

Attorneys for the liquidator:—Messrs. *Chalk*, *Walker*, and *Smetham*.

Attorneys for the contributories:—Messrs. *Little*, *Smith*, *Frere*, and *Nicholson*.

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APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

SITA'RA'M PARAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* NIMBA VALAD HARISHET' (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), Sections 5 and 14—Delay—Sufficient cause—Deduction of time spent in another litigation in respect of the same subject-matter—Mistake of law.

Mere ignorance of the law cannot be recognized as a sufficient reason for delay under section 5 of the Limitation Act (XV of 1877).

A obtained a decree against *B* as the heir and legal representative of his deceased uncle *C*. The decree directed that the amount adjudged should be recovered from *C*'s assets in the hands of *B*. In execution of this decree certain property was attached. *B* claimed this property as his own, and sought to remove the attachment, but the Court passed an order confirming the attachment on the 20th November 1880. In 1881 *B* filed a regular suit to set aside this order. The suit was dismissed in 1885, as barred by section 244 of the Civil Procedure Code (Act XIV of 1882). Thereupon *B* filed an appeal from the order in execution made on the 20th November 1880. This appeal was rejected as time-barred (under article 152 of sch. II of Limitation Act XV of 1877).

Held, that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit.

SECOND appeal from the decision of S. Tagore, District Judge of Násik, in appeal No. 102 of 1885.

One Nimba valad Harishet obtained a decree against Sitárám Paraji as the legal representative of his uncle Váman Bhagvant, deceased. The decree directed that the judgment-debt should be recovered from the assets of the deceased Váman in the hands of Sitárám.

In execution of this decree a house and a field were attached. Sitárám objected to the attachment, on the ground that the property attached was the joint family property of himself and his deceased uncle Váman, and that upon Váman's death without issue the whole property had passed to him by right of survivorship. He therefore contended that it was not liable to attachment and sale.

* Second Appeal No. 525 of 1886.

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The Subordinate Judge of Thengoda disallowed this objection, and passed an order on 20th November 1880 confirming the attachment.

In 1881 Sitárám filed a regular suit to establish his title to the property attached.

This suit was ultimately dismissed by the High Court on second appeal (No. 526 of 1883), on the ground that the question involved in the suit was one relating to the execution of a decree and therefore cognizable only by the Court executing the decree, as provided by section 244 of the Civil Procedure Code (Act XIV of 1882). The High Court held that the only course open to the plaintiff Sitárám was to have appealed against the order of the Subordinate Judge, dated 20th November 1880; and "if he omitted to appeal, he could not rectify that omission by a separate suit." *Nimba Harishet* v. *Sitárám Párájí*.[1] This decision of the High Court was passed on 16th April, 1885.

Thereupon Sitárám filed an appeal in the District Court of Násik against the order of the Subordinate Judge of Thengoda, dated 20th November, 1880.

This appeal was rejected as barred by limitation.

Sitárám thereupon filed a second appeal in the High Court.

Máneksháh Jahángirsháh for appellant:—Section 5 of the Limitation Act (XV of 1877) empowers a Court to admit an appeal even after the prescribed period, if sufficient cause is shown for the delay. In the present case we were carrying on a *bonâ fide* litigation in respect of the same subject-matter in a different Court. Upon the analogy of section 14, the time occupied in that litigation should be deducted.

There was no appearance for the respondent.

WEST J.:—Decree confirmed with costs. The time spent in the actual proceedings in the suit to set aside the order in execution might properly be deducted in computing the delay that occurred before the present appeal was filed. Such a deduction would follow the analogy of the rule prescribed by section 14 of the Limitation Act (XV of 1877) for ordinary suits. But a deduc-

(1) I. L. R., 9 Bom. 458, at p. 460.

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tion of the time that passed before the suit was filed would not follow that analogy. Mere ignorance of the law cannot be recognized as a sufficient reason for delay under section 5 of the Act, for that would be a premium on ignorance.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

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MULJI BHULA'BHA'I AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MANOHAR GANESH (ORIGINAL PLAINTIFF), RESPONDENT.*

Possession—Adverse possession—Manager of a Hindu temple—Shevaks or servants of an idol—Rights of manager and servants inter se.

The plaintiff was the hereditary manager of the temple of Shri Ranchord Ráiji at Dákor. The defendants were the *shevaks* or ministers of the deity. The plaintiff sued to oust the defendants from a certain piece of land attached to the temple, alleging that the defendants had erected shops on the land, and appropriated the rents to their own use, although it had been already decided in a suit between the parties that the land was always to be kept open and unoccupied for the use of the temple. The *shevaks* contended that they had been in exclusive and uninterrupted possession of the land in dispute for more than twelve years, and that by reason of such user they had acquired a *quasi* proprietary title at least as against the manager of the temple. They therefore pleaded that the suit was barred by limitation.

Held, that the defendants had not by occupation and user acquired any title as against the plaintiff who was the manager of the temple estate. They had come into occupation originally as servants and representatives of the deity, and during their occupation they could not by a wish change the nature of their possession. Both they and the plaintiff held the land for the same deity and their rights could not be adverse to each other so as to give rise to a title by prescription. The only question then was as to which of them was the proper representative of the deity for the particular purpose of this suit, and that question had already been decided in a former suit(1) in favour of the plaintiff.

CROSS second appeal from the decision of S. H. Phillpotts, District Judge of Ahmedabad, amending the decree of Ráv Sáheb Harderám, Second Class Subordinate Judge of Umreth.

The plaintiff sued as the hereditary manager of the temple of Shri Ranchord Ráiji at Dákor to eject the defendants, who were *shevaks* or priests of the idol, from a certain piece of land which was attached to the temple. The plaintiff alleged that

* Cross Second Appeals No. 452 and 514 of 1883.

(1) See note *infra*, p. 325.

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MULJI BHULÁBHÁI v. MANOHAR GANESH.

the defendants had illegally erected shops on the land in dispute and appropriated the rents thereof to their own use, although it had been decided in a former litigation between the parties that the land in question was part of the court-yard of the temple and should always remain open [1] and unoccupied by any shops, booths, or other similar erections. The plaintiff therefore prayed for an order directing that the land should remain open as it was originally, and for a permanent injunction restraining the defendants from using the land or realizing any profits by erecting shops or booths thereon. The plaintiff also sought to recover Rs. 160, being the amount of rent received by the defendants during six years from 1874 down to the institution of the suit in 1880.

The defendants answered that the land in dispute was in their possession and management as land appurtenant to the *gaushálá* (cow-shed) of Shri Ranchord Rájiji, that it was used for the benefit of the *gaushálá*, and the profits and rent arising therefrom were received by them on behalf of the *gaushálá*; that they were owners of the idol and the *gaushálá*; that as owners they had been in possession of the land for more than twelve years before the suit; and that the plaintiff's claim was barred by limitation.

The Court of First Instance ordered the defendants to give up possession of the land and enjoined them to leave the same permanently open and unencumbered. The rest of the plaintiff's[1] claim was rejected.

On appeal, the District Judge amended the decree by inserting words ordering the defendants to remove the obstruction already erected.

Against this decision the defendant appealed to the High Court on the ground that the plaintiff had lost his right to the land in suit by reason of their adverse possession for more than twelve years.

The plaintiff filed a cross appeal on the ground that the lower Court ought to have directed the defendants to render an account of the rents and profits of the land in dispute, which they had realized from 1874 to 1880.

(1) See note *infra*, p. 325.

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Gokuldás Kahándás Párekh for appellants:—The *shevaks* have had possession of the land in suit for more than twelve years. They have held it adversely to the plaintiff for so long a period as to acquire a *quasi*-proprietary title to the land at least as against the plaintiff. The plaintiff cannot therefore disturb their possession.

Shántárám Nárâyan for respondent:—The plaintiff is the hereditary manager of the temple. The *shevaks* are merely votaries or worshippers of the deity. They have no proprietary title to the temple or to any part of the temple property. It has been already decided by this Court that the land in dispute is to be kept open.—*Ganpatráo Manohar* v. *Anoprám Bechar*.[1]

The *shevaks* had therefore no right to erect shops on the ground in question. They must account to the manager for the rents and profits they have realized during the period they have set up the shops.

WEST, J.:—The contention that the *shevaks*, the defendants in this case, though they acquired possession or detention of the land in dispute as servants and representatives of the deity Ranchhod Ráiji, have yet by long occupation and user acquired a *quasi*-proprietary title as against the manager of the temple estate, the plaintiff Manohar, is not one that can be admitted. It is opposed to the principle *Nemo potest possessionis suae naturam mutare*. Having come in as servants or representatives of the deity, they could not by a wish or a volition change the nature of their possession, if possession it was to be called. They held for the deity, however; Manohar held for the same deity. In that ideal personage the two rights concurred, and one could not therefore really be adverse to the other, so as to give rise to a title by prescription. The only question is as to the proper representative of the deity for this particular interest; and on the former decisions no doubt can be entertained that the plaintiff holds that position. He could not have used the ground in dispute so as to realize any profit from it. The defendants who have made a small profit by their unauthorized use of it as representatives of the deity will have to account for the sums they have received in the suit for an account in which we recent-

(1) See note *infra*, p. 325.

ly gave judgment. We therefore confirm the decree of the District Judge with costs in the case of each of the appeals before us.

Decree confirmed.

Note.—The following is the judgment of the High Court in the former suit (*Ganpatráo Manohar* v. *Anopram Bechar*) between the parties relating to the land in dispute:—(Printed Judgments for 1879, p. 361.)

WESTROPP, C.J.—There cannot be any doubt that the decree of this Court of the 8th April, 1872, made in Special Appeal 448 of 1870, recognises that the temple at Dákor and its appendant villages of Dákor and Kanjeri are vested in the defendant Tambekar, as manager on behalf of and trustee for Shri Ranchhodraiji, the idol of that temple, and that the defendants, the *shevaks*, have not any share whatever in that management and cannot be considered as having any legal ownership, even as trustees, in the temple or its villages, but as votaries of the idol they (like any other worshippers at the temple) may complain and bring to the notice of the proper Civil Court any misappropriation of the funds or misuse of the temple or its villages. They have at times, but without success, asserted the right to manage and exercise a species of proprietorship, but the decree of the 8th April, 1872, has finally disposed of any such claim in the negative. If the question as to the erection by the defendant Tambekar, as trustee and manager of the temple, of a tent or tents, or, more properly speaking, of a booth or booths on the portion of the court-yard of the temple, mentioned in the plaint, were now raised for the first time, we might probably have remanded this case to the lower Court to enquire whether, without inconvenience to the public frequenting the temple, or to its residents, a booth or booths might, advantageously to the funds of the temple, be erected on the occasion of the principal festivals observed in the temple, and let out to petty dealers; but we find that the use of this portion of the court-yard has been the subject of previous litigation in 1862, and that the Munsiff held that the *shevaks* had no right to erect shops there, and compelled them to remove such shops, and ruled that the ground should remain in the possession of the idol, *i. e.* substantially in the possession of the trustee for the idol; and we also gather from that decree, as did the Acting Joint Judge (Mr. Izon), in the present case, that the Munsiff was of opinion that the portion of the court-yard in question should remain open and unincumbered by any shops, booths, or other similar erections, and the decree of the Munsiff was affirmed on appeal and again on special appeal (see Exhibits Nos. 18, 4, and 5). Under these last-mentioned circumstances, we do not think it would be proper or desirable to remand the case, even at the request of the trustee, Tambekar, for the purpose of making such an inquiry as above indicated. Upon these grounds, we affirm the decree of the Acting Joint Judge (Mr. Izon), but direct that the parties respectively shall bear their own costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887 *June 2.*

BA'LKRISHNA INDRABHA'U (ORIGINAL PLAINTIFF), APPELLANT, *v.* A'BA'JI BIN BAHIRJI MORE (ORIGINAL DEFENDANT), RESPONDENT *

Dekkhan Agriculturists' Relief Acts (XVII of 1879), Section 20, and Act XXII of 1882, Sec. 15B—Decree—Payment of decree by instalments—Default—whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.

Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorize a variation of any order once so made. Nor does section 20 of Act XVII of 1879 authorise a series of instalment-orders each one varying from the preceding.

A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused, but the Subordinate Judge in appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in.

Held, that the Subordinate Judge in appeal had no power to make a fresh order for payment by instalments varying the original order.

Held, also, that the judgment-creditor by taking out the money paid into Court by the judgment debtor as instalments due under the second order for instalments did not bind himself to abide by that order.

SECOND appeal from the decree of Ráo Báhádur C. N. Bhat, First Class Subordinate Judge, A. P., of Sátára, in appeal No. 113 of 1885.

The appellant Bálkrishna Indrabháu obtained a decree against Ábáji bin Bahirji More on 11th October 1882. On Ábáji's application it was ordered that the amount of the decree should be paid by annual instalments of Rs. 200 each, and that in default of payment of any one instalment, the whole sum remaining due should be recoverable at once. Ábáji made default, and thereupon the appellant sought to recover the whole amount due under the decree.

* Second appeal No. 638 of 1885

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Ábáji then made a fresh application under section 15B of the Dekkhan Agriculturists' Act (XXII of 1882) for an order directing payment by instalments. This application was refused by the Court of first instance, but on appeal the First Class Subordinate Judge ordered that he should pay within a fortnight the amount of instalments which had become overdue, and pay the remaining amount by yearly instalments of Rs. 200 each.

Against this order the decree-holder appealed to the High Court. He however took out the money which the judgment-debtor had paid into Court on account of the instalments which had become due under the varying order.

Branson (with him *Máhádev C. Apte*) for appellant:—Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) does not authorize a Court to make a series of orders for payment by instalments. He referred to *Datto Náráyan* v. *Balwant Náráyan*[1].

M. B. Chaubal for respondent:—Section 15B of Act XXII of 1882 allows a Court to vary an order for payment by instalments. Section 20 of Act XVII of 1879 enables a Court to fix instalments. There is nothing in the Act to prevent a Court's exercising this power more than once. The decree-holder has, moreover, acquiesced in the order of the lower appellate Court, by taking out all the moneys which have been paid into Court on account of the instalments fixed.

WEST, J.:—In the present case the Court in decreeing payment of a debt secured on immoveable property granted to the judgment-debtor the indulgence of paying by annual instalments. Afterwards in the course of the proceedings in execution and after a default had been made whereby the whole sum decreed had become due, the judgment-debtor sought a new order for instalments. The Subordinate Judge in the Court of first instance refused it, but the Subordinate Judge in appeal has allowed it. The latter order cannot be sustained.

Section 15B of the Dekkhan Agriculturists' Relief Act XXII of 1882 allows the Court to order payment by instalments either in

(1) Printed Judgments for 1885, p. 248.

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its decree or in the course of the execution, but it does not authorise a variation of any order once so made. If this could be done, the decree would be subject to indefinite variation. It has been contended before us that such variation, in order to adapt execution to the means of the debtor, is a necessary corollary from the terms of the section; but however logical the deduction might be, the Legislature has not thought fit to draw it. Section 20 of Act XVII of 1879 provides for instalment orders in ordinary cases, but it has not been held that it authorises a series of instalment orders each one varying from the preceding.

The instalments directed by the Subordinate Judge in his varying order were paid into Court by the judgment-debtor. He had even paid in some instalments, it is said, before the order was made. The judgment creditor took these moneys out, and it is urged that he thereby bound himself to abide by the second instalment order. But the whole amount of the decree having become due to the creditor on the first default, he was quite justified in taking all that was placed at his disposal towards the discharge of the debt due to him. No condition was annexed to the tender or lodgment of the sums in Court; they were paid in and were taken out simply subject to the rights and duties of the parties as they might subsist. The judgment-debtor could not, by merely complying with or anticipating a wrong order, convert it into a right one or take advantage of it as such, and the judgment-creditor did not, by taking part of what was due to him as he could get it, forfeit or postpone his right to the residue.

We therefore reverse the decree in appeal and restore that of the Court of first instance with all costs on the respondent.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

GOPA'L ANANT (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YAN GANESH (ORIGINAL PLAINTIFF), RESPONDENT.*

1888. *February* 2.

Hindu Law—Adoption by an unmarried man.

Adoption by an unmarried man is not invalid.

SECOND appeal from a decision of F. C. O. Beaman, Acting Assistant Judge of Sátára.

This was a suit brought by the plaintiff to have it declared that he was the adopted son of one Ganesh, who was a vatandár kulkarni of the village of Angápur in the Sátára District, and that as such he was entitled to a one-half share in the vatan.

The defendants, who were co-sharers with Ganesh, denied the fact of the plaintiff's adoption, and also contended that Ganesh being an unmarried man could not adopt.

The Court of first instance rejected the plaintiff's suit on the ground that the fact of adoption was not proved.

The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decision with the following remarks :—

"I consider it constructively certain that the plaintiff was adopted in proper form and given in adoption by his natural father. We are in no doubt as to the intention of the adopter; we have on the record a letter written by him to the Deshpande concordantly with customary usage stating that the adoption took place on a certain date. * * * "

Defendant Gopál preferred a second appeal to the High Court.

Ganesh Rámchandra Kirloskar for the appellant :—Ganesh, the adoptive father of the plaintiff, being unmarried could not effect a valid adoption. The Hindu law permits adoption when the possibility of issue is extinct, and until a man marries he cannot be said to be hopeless of issue. A Grihasta, *i.e.* a married man, alone can adopt. Reference was made to West and Bühler, pp. 918 and 919, 905; Steel (new ed.), 182; *Ibid*, p. 43, ch. IV and V, pl. 36; Vy. Mayukha, sl. 45 and 70.

* Second appeal No. 557 of 1885.

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Shámráv Vithal for the respondent :—The Hindu law does not prohibit adoption by an unmarried man. The only condition is that the adopter should be without a son. A bachelor is capable of adopting : see Mayne's Hindu Law, section 96. Marriage is a mere Sanskár. A Brahmachári can adopt, see West and Bühler, 943, 3rd Ed. A soulless man (Aputra) includes an unmarried man : Strange's Hindu Law, pp. 65-66. A widower can adopt, see *N. Chandvasekharudu* v. *N. Bramhanna*,(1) and the same argument must apply in the case of an unmarried man.

NÁNÁBHÁI HARIDÁS, J. :—The fact of the plaintiff's adoption by the deceased Ganesh Gopal is held proved by the lower Court. The only question we have to determine, therefore, is its validity. It is urged on behalf of the appellant that it is not valid because Ganesh Gopal was not a married man at the time of the adoption. No authority is shown to us in support of the contention that an adoption by an unmarried man is invalid, nor are we aware of any such. The Hindu law lays down generally that one who is soulless may adopt ; and, in the absence of any text or judicial decision to the contrary, we do not think we should be justified in putting any restriction upon the power so generally given. The argument pressed upon us in support of the invalidity of the adoption is very much the same as that unsuccessfully urged in *N. Chandvasekharudu* v. *N. Bramhanna*(1) ; and we agree in the view taken of the Hindu law by the learned Judges who decided that case. It is true that that was the case of a widower, and not of an unmarried man as here ; but we think the reasoning adopted there applies as well to the present case.

We must therefore confirm the decree of the lower Court with costs.

Decree confirmed.

(1) 4 Mad. H. C. Rep. 270.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

NA'NA'BHA'I, AND FOUR OTHERS (ORIGINAL), APPELLANTS, *v.* SHRIMAN GOSWA'MI GIRDHARIJI (ORIGINAL PLAINTIFF), RESPONDENT.* 1888. *February* 13.

Hindu Law—Property dedicated to idol—Trustee—Primogeniture—Takait Maháráj, office of—Deposition from office by Sovereign Prince—Effect of order of deposition—Jurisdiction.

By the custom of primogeniture obtaining in his family, the plaintiff succeeded to the office of Takait Maháráj, and came into possession of all the property dedicated to the family idol of Shri Náthji. He resided at Nathdwár within the territories of the Ráná of Udepur in Mewar. Part of the dedicated property was at Poona. The first four defendants managed this portion of the property for the plaintiff. They collected the rents and transmitted them to him from time to time. In 1876 the Ráná deposed the plaintiff for alleged misconduct, deported him from his territories, and proclaimed the plaintiff's son (defendant No. 5) as Takait Maháráj. The defendants having refused to pay over the rents and to deliver the Poona property to the plaintiff, the plaintiff brought the present suit to recover possession. The plaintiff's son was made a co-defendant on his own application. The defendants denied the plaintiff's right to the property on the ground that he had been deposed and banished by the Ráná, and the fifth defendant (the plaintiff's son) claimed to be Takait Maháráj, and as such to be entitled to all the Devasthán property. The lower Court made a decree in favour of the plaintiff. On appeal by the defendants to the High Court,

Held, that the plaintiff was entitled to the property in dispute. The order of the Ráná could not be regarded as a foreign judgment between the parties. That order, whatever its effect might be within the territories of the Ráná, could not affect the property situated in Poona beyond his jurisdiction. It had descended to the plaintiff on the death of his father in virtue of the custom of primogeniture obtaining in his family. Whether he took it as owner or as trustee for the idol and shrine was immaterial, for in either case he had a right to possession. If he took it as owner he had not in law lost his right as such in consequence of the Ráná's act. If he held merely as a trustee he had not yet been removed from his office by any competent tribunal.

APPEAL from a decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge at Poona.

The office of high priest (Takait Maháráj) of the idol Shri Náthji was held for generations by the eldest son of the eldest branch of the plaintiff's family. The plaintiff as eldest son succeeded to the office, and obtained possession of the idol and

*Appeal No. 27 of 1885.

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of all the property dedicated to it. Part of the property was situated in Poona. The plaintiff resided at Nathdwár within the territories of the Ráná of Udepur in Mewar, and he employed the first four defendants to manage the property at Poona, to receive the rents &c. and transmit them to him. He held the office of high priest and received the income of the property until the year 1876, in which year certain disputes of a political character arose between himself and the Ráná, the result of which was that the Ráná deposed and banished him from Udepur and proclaimed his (the plaintiff's) son Shri Goverdhan (defendant No. 5) as Takait Mahárái.

The first four defendants thereupon ceased to pay over the rents of the Poona property to the plaintiff. In 1880 he filed this suit against them to recover possession of the property.

The plaintiff's son Shri Goverdhanlálji (defendant No. 5) was made a co-defendant on his own application. He denied the plaintiff's right to recover on the ground that he had been deposed and banished by the Ráná, who had made over the property to him (the defendant).

The Subordinate Judge of Poona made a decree in favour of the plaintiff.

The defendants appealed to the High Court.

Jardine (instructed by Bháishankar of Messrs. Jefferson, Bháishankar, and Dinshá) for the appellants:—The income of the property must be applied to the use of the idol Shri Náthji, and the plaintiff having been deposed is no longer entitled to receive it. The Ráná had full power to depose the plaintiff for his conduct and he is no longer the Takait Mahárái. It was only in virtue of holding that office that he received the income of the dedicated property. The fifth defendant has been declared the Takait Mahárái by the Ráná, whose order cannot be questioned.

Latham (Advocate-General) instructed by Messrs. Hore, Conroy, and Brown, for the respondent:—The plaintiff succeeded to the property in virtue of his office and by the custom of primogeniture. The Ráná had no power to depose him from the office. There is no precedent for such an act. The property

dedicated to the idol came into the plaintiff's hands on his succession either as his own private property or as trustee. In neither case can the Ráná of Udepur deprive him of the property at Poona. If the plaintiff held it merely as trustee he is entitled to retain it until removed from office by the proper tribunal, *viz.* a British Court. The plaintiff's banishment from the territories of Udepur does not deprive him of his trusteeship or of the office of Takait Mahárájj. So long as he is living his son (defendant No. 5) has no right to that office.

NÁNÁBHÁI HARIDÁS, J. :—We are of opinion that this appeal should be dismissed with costs. It is established, and indeed was never denied, that the plaintiff, as the Takait Mahárájj by right of primogeniture obtaining in his family for generations past, was in possession of the idol of Shri Náthji belonging to the family and inherited from his ancestor Vithalnáthji, with all the property dedicated to that idol, till 8th May, 1876. The property now in dispute is admittedly a part of such property; and the Subordinate Judge has found, and we think rightly, upon the evidence, that all the defendants, except the defendant No. 5, were holding the same as his agents, the same having been made over to them for management as the plaintiff was residing at Nathdwár within the territory of the Ráná of Udepur in Mewar. In this suit by the plaintiff to recover such property from them, the defendant No. 5, who is his son, was made a party-defendant on his own application, in order to enable him to contest the plaintiff's right if he could. The son put in a written statement denying that the plaintiff had now any right to recover. He urged that the Ráná had deposed the plaintiff from the *gádi* of Tikait Mahárájj and deported him from his territory; that he himself had been placed on such *gádi* by the Ráná in 1876; and that, therefore, he was entitled to possess and manage all the property belonging to the idol. The fight is thus one really between the father and the son. The fact of such deposition and deportation is not denied by the plaintiff. It was in consequence of some disputes of a political character between the Ráná on the one side and the plaintiff on the other that the deposition and deportation took place. What those

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disputes were it is not necessary for us to enquire. It is enough for us to say that the Ráná's order cannot be regarded as a foreign judgment between the parties. Being an independent prince within his own territory we are not called upon to pronounce any opinion as to the propriety of his act or as to its effect within such territory. But the property in dispute in this case is situated in the Poona district, beyond his jurisdiction, and is governed by the law obtaining there. That property descended to the plaintiff on the death of his father several years ago, and, as found by the Subordinate Judge, was held by him through his agents, defendants Nos. 1 to 4, until his son, defendant No. 5, asserted his own right to it under the Ráná's order. It has not been shown to us that the Ráná has ever before deposed a high priest from his office on any ground whatever. The right of primogeniture obtaining in the family, the son has no right to it during the father's lifetime. The Subordinate Judge is therefore right in awarding possession to the plaintiff. Whether the plaintiff is the owner of it as well as of the idol and the shrine, or merely a trustee for the idol and the shrine, is a question which does not really arise in this case, for in either case he is entitled to recover possession. If he is the owner of the idol and of all the property dedicated to it by his followers from time to time, as he alleges he is, he has not, we think, in law lost his right as such in consequence of the Ráná's act. If he is merely a trustee, he has not yet been removed from his office by any competent tribunal. Such being the case, we must confirm the decree of the Subordinate Judge and dismiss the appeal with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

COWASJI RUTTONJI LIMBOOWA'LLA', (PLAINTIFF), *v.* BURJORJI RUSTOMJI LIMBOOWA'LLA' AND OTHERS, (DEFENDANTS).*

1888. *January* 10

Evidence—Evidence Act I of 1872, *Sec.* 92—*Oral agreement inconsistent with written document.*

Ruttonji Nowroji prior to his death was a partner with defendants in the firm of Nowroji Cursetji & Co. He died on 8th November, 1884. On the 9th November, 1885, his executors passed a release to the defendants, which recited that Ruttonji's share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after examining the books and taking accounts, &c., a balance of Rs. 8,395-11-0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of Ruttonji, &c. On the 7th April, 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release; that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners, at the time of the release, that, in addition to the sum therein mentioned, the executors as representing the testator's estate should receive a one-anna share in the partnership.

The defendants denied the right of the plaintiff, and contended that the interest of Ruttonji and his estate in the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share; and contended that, under section 92 of the Evidence Act I of 1872, no evidence could be given of the alleged agreement. For the plaintiff it was contended that the agreement as to the one-anna share was quite independent of the release.

Held, that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release (Evidence Act, sec. 92). By the release the executors of Ruttonji released the partners from all claims whatever in respect of Ruttonji's share, and the consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for the release in respect of the past accounts, *viz.* the continuance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing, and was inconsistent with those terms.

*Suit No. 323 of 1887.

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Held, also, on the evidence, that it had not been proved that all the partners consented to the alleged new partnership, and that on this ground alone the plaintiff could not succeed in his suit.

THE plaintiff, as the assignee of a one-anna share in the profits of a business carried on under the name of Nowroji Cursetji & Co., sued the defendants, as co-partners in the said firm, praying that it might be declared that he was entitled to the said share in the firm as from the 19th October, 1884; that an account of profits from the said date might be taken, and plaintiff's share therein paid over, &c.

The plaintiff claimed the said share under an assignment thereof executed to him on the 7th April, 1887, by Pirozbái and Bápuji Ruttonji, the executrix and executor of one Ruttonji Nowroji Limboowálla, a former partner in the firm, who died on the 8th November 1884.

The deceased Ruttonji Nowroji and all the defendants, except defendant No. 5, were members of the same family, to which the firm had belonged for many years.

The following paragraphs of the plaint set forth the allegations material to this report, as follows:—

"4. The accounts of the said partnership had remained unadjusted for many years prior to the death of the said Ruttonji Nowroji; and his co-partners, the defendants, had before his death been very anxious to obtain the signature of the said Ruttonji Nowroji to some release or adjustment. After his said death the said defendants were anxious to obtain such release from the said executor and executrix, and negotiations were carried on in that behalf. Ultimately it was agreed between them as follows:—that is to say, that the said executor and executrix should accept a certain lump sum offered by the defendants as the amount due to the estate of the said Ruttonji Nowroji, without further examination of the past accounts of the firm, and should pass a release in respect thereof; and that the interest of the said executor and executrix as representing the estate of the said Ruttonji Nowroji should be continued as a one-anna share, and should be calculated as from the beginning of the *Samvat* year 1941. It was also arranged, for convenience, that

such share should be continued in the name of the said Bái Pirozbái.

"5. In accordance with the said settlement, the said executor and executrix on the 9th November, 1885, received from the defendants the lump sum agreed upon, and passed the release as arranged.

"6. Subsequently the defendants have entirely repudiated the arrangement as to the one-anna share, and have declined to recognise the same or pay any share whatever to the said executor and executrix thereunder, and claim that they (the defendants) are alone interested in the said business.

"7. By an assignment in writing, dated the 7th April, 1887, the said executor and executrix have assigned over to the plaintiff all their said interest in the said firm. The plaintiff claims under the said assignment to be entitled to a one-anna share in the profits of the said firm of Nowroji Cursetji & Co. from the 1st *Kártika Sud Samvat* 1941, (19th October, 1884,), but the defendants have declined and still decline to pay any portion of the said profits to the plaintiff, or to recognise his interest therein."

The defendants denied the plaintiff's right to any share in the partnership. They alleged that, subsequently to the death of Ruttonji Nowroji, they paid his executors, who had previously examined the partnership books, the full amount ascertained to be due to his estate by the firm; and that, on such payment being made, the said executors, as such, had executed a formal release to the defendants, dated 9th November, 1885, "of and from the share and interest of him, the said Ruttonji Nowroji Limboowálla, in the said firm of Nowroji Cursetji Limboowálla & Co. and of and from all claims and dividends whatever, &c., &c., for or in respect of the sum and all other matter and things in any wise relating to the premises."

The defendants denied all the allegations contained in the fourth paragraph of the plaint above set forth, and contended that the share and interest of the said Ruttonji Nowroji and his estate in the partnership ceased on his death.

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The release, dated 9th November, 1885, which was put in evidence, recited *(inter alia)* that Ruttonji's share in the firm and in the future business thereof had ceased on his death, and that the surviving partners had requested the executor and executrix to settle the account of their testator with the firm, and that *after examining the books and taking accounts*, &c., &c., a balance of Rs. 8,395-10 was found to be due, on payment whereof "they, the said Pirozbái and Bápuji Ruttonji, as such executors as aforesaid, do hereby release and for ever discharge, &c."

The plaintiff admitted that the executors had taken the sum mentioned in the release, and had executed the release; but he adduced evidence to show that there had not been an accurate examination of the books; and that the amount really due by the firm had not been ascertained, so that it had been agreed on by the parties *at the time of framing the release that*, in addition to the sum therein mentioned, the executors should receive a one-anna share in the partnership.

The only issue tried at the hearing was "whether the plaintiff's claim was not barred by the release." The defendants contended that, under section 92 of the Evidence Act I of 1872, no evidence of the alleged agreement as to the one-anna share was admissible.

Latham (Advocate General) and *Lang* for the defendants:—No evidence can be given as to the alleged agreement made at the time of the release. We rely on section 92 of the Evidence Act I of 1872: see proviso 2; *Rám Doolál* v. *Rádhá Náth*[1]; *Banápá* v. *Sundardás Jagjiwandás*[2].

Farran and *Jardine* for the plaintiff:—The agreement as to the one-anna share which was to be given to the executors was an agreement quite independent of the release. The release only dealt with the past interest of the testator in the firm. This agreement gives a new share to the executors.

10*th January*, 1888. SCOTT, J.:—The plaintiff in this case claims, as assignee of the executrix and executor of Ruttonji Nowroji, deceased, to be entitled to a one-anna share in the business carried on by the defendants under the name of

[1] 23 Calc. W. R. Civ. Rul., 167. [2] I. L. R., 1 Bom., 333.

Nowroji Cursetji & Co., of which firm the deceased Ruttonji was a partner.

The facts on which the plaintiff relies are set out in the fourth paragraph of the plaint, as follows:—"The accounts of the said partnership had remained unadjusted for many years prior to the death of the said Ruttonji * * * The defendants were anxious to obtain the signature of the said Ruttonji to some release or adjustment. After his said death the said defendants were anxious to obtain such release from the said executor and executrix * * * Ultimately it was agreed between them as follows:—that the said executor and executrix should accept a lump sum offered by the defendants as the amount due to the estate of the said Ruttonji, without further examination of the past accounts of the firm, and should pass a release in respect thereof, and that the interest of the said executor and executrix *as representing the estate of the said Ruttonji* should be continued as a one-anna share."

It was contended that the plaint in this paragraph set up two agreements: one that a lump sum should be taken in satisfaction of past claims, concerning which a written release was passed; another that a new partnership, consisting of a one-anna share, should be given to Ruttonji's heirs, which separate agreement was not in writing. As regards the nature of that separate agreement, we have the evidence of Mr. Wádia and the accountant. Mr. Wádia told us that when he advised Bápuji against the insertion of the sentence in the release about the examination of the books, Bápuji said "they had made some arrangement, and this insertion would settle the matter."

The independent and trustworthy evidence of the accountant shows what the arrangement was. He says that Bápuji and Burjorji settled, in his presence, "the accounts of the old partnership were to be finally adjusted, and a new one-anna partnership was to be made for the heirs." Soon after this the release was made. It appeared to me, from the accountant's evidence and still more clearly from the evidence of the plaintiff and the others who appeared on his side, that the adjustment of the accounts, without further examination, was the real consideration for this alleged new partnership. The words in the plaint, "as

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representing the estate of the said Ruttonji", seem also to set up this case. The first question that arises is, whether this evidence is admissible under section 92 of the Evidence Act I of 1872.

The operative words of the release are as follows:—"In consideration of the payment of Rs. 8,000, they, the said Pirozbái and Bápuji, as such executrix and executor, do hereby release the parties from the share and interest of Ruttonji in the said firm." Together with these words must be read the recital that the sum of Rs. 8,895 was arrived at *after examination of the books*. Is the alleged oral agreement inconsistent with this written agreement, and excluded by the rule of law, that parol evidence cannot be tendered for the purpose of altering the terms of a written contract? I admitted evidence of the alleged oral agreement—not that I was satisfied on this point, but because I wished to know the precise terms of the agreement before I came to a decision. Now that I find all the plaintiff's witnesses concurring in saying that the one-anna share was agreed to be given in consideration of the accounts *not being examined*, this agreement seems to me inconsistent with the writing whereby the representatives of Ruttonji released the partners from all claims whatever in respect of Ruttonji's share and interest. It seems to me impossible to hold that this new agreement did not arise out of Ruttonji's share and interest.

The case, then, stands thus:—The consideration *in the writing* for the determination of that interest, is the payment of a lump sum. The sum was paid and, under the writing, all claims arising out of the old partnership ceased and determined. The *oral agreement* adds another term as the consideration of waiving all claims on the past accounts—to wit, the continuance of a one-anna share in the partnership. Under section 92 of the Indian Evidence Act I of 1872, I feel bound to exclude this oral agreement. It is not a purely collateral or additional agreement. It constitutes an addition to the terms of a contract that had been reduced into writing, and is inconsistent with those terms.

It may be useful to add my opinion, that the plaintiff would fail on another and less technical ground. It is one of the

fundamental principles of partnership law that no person can be introduced as a partner without the consent of all those who, for the time being, are members of the firm. An exception to this rule might be found in India, as regards deceased partners' sons, in a strictly family partnership. But there is no sufficient evidence that this firm bore that hereditary character. Sons of other partners had been admitted, but as working partners, and not always in the same share. It was not shown that they came in as of right. Moreover, the release distinctly states that Ruttonji's share ceased from the date of his death. The consent to this new one-anna share was given, according to the most trustworthy witness, the accountant, by Burjorji only a few days before the release. I do not think the alleged agreement of July is proved satisfactorily. The oral evidence on the point is contradictory, and the correspondence negatives any distinct arrangement such as that now set up. I am of opinion, on the evidence, there were negotiations, but nothing more. It is not proved to my satisfaction that the others consented to this new partnership, nor that Burjorji had authority to act for all. If, then, Burjorji alone consented, his consent would not bind the rest of the partners, especially Jamsetji, whose interest equalled that of Burjorji, and who denies consent altogether. I may add, that, even if Burjorji had the power to act for others, it is doubtful whether this agreement would not be without consideration; the claim on behalf of Ruttonji was released, and his representatives had no claim of their own. The sons did not work for the firm, and their money in the firm bore interest. But I do not think it necessary to decide that point. Although I agree with Mr. Farran that there probably was some arrangement made, I think the plaintiff's assignors put themselves legally, if not morally, out of Court, first by their signatures to the release; and secondly, by their neglect to obtain the consent of all the partners.

Judgment for defendants, with costs.

Attorney for the plaintiff:—Mr. *J. C. Cámá.*

Attorneys for the defendants:—Messrs. *Chalk, Walker, and Smetham.*

INSOLVENCY JURISDICTION.

Before Mr. Justice Bayley.

1868. January 11, 25.

IN *RE* DEWCURN JEWRA'J AND HEERJEE DEWCURN, (INSOLVENTS).

Insolvency—Indian Insolvent Act (Stat. 11 and 12 Vic., C. 21)—Expunging names of creditors from schedule—Official Assignee a trustee for creditors admitted in schedule.

The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July, 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karáchi and six in Multán. The debts amounted, in the aggregate, to Rs. 51,819-13-0, and were all admitted, some of them being of trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to Rs. 27,500. The insolvents obtained their personal discharge in March, 1869. Since the date of the insolvency one dividend had been declared, *viz.* a dividend of one per cent., in 1870. Only one creditor had applied for and received that dividend. On the 15th July, 1880, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time, unable to adduce any proof in his own possession, in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October, 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from the insolvents' schedule.

Held, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims.

The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims.

RULE obtained by Káloorám Mahánandrám, a creditor of the insolvents, on the 5th October, 1887, calling upon each and all of the creditors of the said insolvents to appear and show cause "why they should not come in and prove their claims against the said insolvents, and, in default of such appearance, to prove their claims as aforesaid, why the names of such creditors as aforesaid should not be expunged from the said insolvents' schedule."

The Court ordered that notice of this rule should be served on all the creditors of the insolvents.

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IN RE DEWCURN JEWRÁJ AND HEERJEE DEWCURN.

The insolvents filed their petition on the 27th February, 1868, under the Indian Insolvent Act (Stat 11 and 12 Vic., c. 21,) and on the 22nd July, 1868, they filed their schedule. They obtained their discharge on the 15th March, 1869.

From the schedule it appeared that the number of creditors on the estate was twenty-six, all of whom were residents of Multán and Karáchi, that the aggregate amount of admitted debts due by the insolvents to the creditors was Rs. 51,819-13-0.

The Official Assignee filed an affidavit, in which he stated that a dividend of four *per cent.* on the said sum of Rs. 51,819-13-0 had been declared in the year 1870, but that since that time only one creditor had applied for and received the dividend. He further stated that the applicant Káloorám Mahánandrám, who was the largest creditor on the estate, applied, for the first time on the 15th July, 1886, for payment of the dividend on his claim of Rs. 27,500; that he was unable, after so long a time, to adduce any proofs in his own possession in support of his claim, but that ultimately he had been allowed to prove his claim from the insolvents' books of account which were in the office of the Official Assignee.

After having thus proved his claim, the applicant Káloorám Mahánandrám obtained the rule above set forth on the 5th October, 1887.

Notices of the rule were duly sent by registered post addressed to the creditors whose names appeared in the schedule. The Official Assignee in his affidavit stated that only seven of such creditors had actually received and signed acknowledgments of the receipt of such notice. These creditors, however, had taken no further steps in the matter.

There was no proof that the other creditors had received the notice. Two of the seven creditors had written to the Clerk of the Court stating that they could not go to Bombay or instruct counsel, because of the expense, and requested that the Court would admit their claim, and send them the dividend due.

Lang appeared for the applicant in support of the rule.

Inverarity appeared for the Official Assignee.

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There was no appearance for any of the other creditors.

Inverarity for the Official Assignee showed cause:—As representing the absent creditors the Official Assignee submits that the Court has no power to do what is asked for by this rule. There is no section in the Indian Insolvent Act (Stat. 11 and 12 Vic., c. 21,) which enables the Court to expunge the names of creditors from the schedule in such a case as this, or to make such an order as is asked for. Section 38 of the Act enables objections to the schedule to be made in cases where creditors have been omitted from it. Section LXI[1] is the only section under which, in other cases, objection can be taken to the schedule, and under this section and under Rule 36[2] such objection

(1) Section LXI:—And be it enacted, that whenever it shall appear to the court, either by the accounts of any assignee or assignees, or otherwise, to be probable that a dividend may be beneficially made amongst the creditors, it shall be lawful for the court to appoint a day for the purpose of making a dividend, and to cause notice thereof to be given in such manner as it shall direct; and on the day appointed the assignee or assignees shall deliver in, upon oath or solemn affirmation, as the case may be, a true statement in writing of all money received by him or by them respectively, and when, and on what account, and how, the same have been employed; and the court shall examine such statement, and compare the receipts with the payments, and shall ascertain what balances, if any, have been from time to time in the hands of such assignee or assignees respectively; and on the said day all parties interested shall be heard, and all objections to the schedule of the insolvent, and to the accounts or conduct of the assignee or assignees; and any claims of any creditors which shall not have been previously determined shall be heard and determined either by such court immediately, or on a reference to the examiner or other officer of the court; and it shall be lawful for the court to examine the insolvent, the assignees, and any witnesses, either on oath or affirmation, and either at that time to declare a dividend, and to direct that the same shall be paid by the assignee or assignees, or to postpone such declaration or direction of the same until a further hearing, and to make such order as shall be just.

(2) Rule 36:—Whenever it shall appear to the Official Assignee, that a dividend may be beneficially made amongst the creditors, he shall apprize the Court; or if it shall appear to any creditor or Insolvent, such party shall be at liberty to state the same to the Court by motion or petition, and the Court, if it shall be of opinion that a dividend may be beneficially made, will appoint a day for the further hearing of such application, and direct that notice shall be given twice in the *Government Gazette*, in the English and one Native language, of such further hearing for the purpose of making a dividend, and of the day fixed for the same, such day not being less than eight days from the second publication of such notice; and upon such further hearing, the Insolvent or the Assignee, and any

can only be taken at the time a dividend is declared. One dividend has been declared on this estate; but that was so long ago as 1870, and no objection to the schedule was taken then or has been since until now. The applicant cannot object to the schedule now.

All the creditors in the schedule are interested in the estate. Their debts are admitted by the insolvents, who have inserted them in their schedule. Upon those debts the Court has declared a dividend. It has thus by its order recognised them as creditors on the estate, and the Official Assignee has become a trustee of that dividend for them. It is true that only one creditor, besides the applicant, has claimed payment of the dividend, but the others have not by non-claim lost their right. The dividend is so small that it is not worth while as yet for them to go to the expense of claiming it. The applicant himself did not claim his dividend until 1886. He is the largest creditor, on the schedule, claiming Rs. 27,500, and yet he has delayed for sixteen years. The others are creditors for very small sums, and they will probably apply by and bye. But the applicant as soon as he has himself found it worth while to apply takes out this rule to force them to come in at once, or be excluded altogether. He hopes thus to get a larger share. There is no doubt they are creditors. The applicant does not suggest that their debts are fictitious or fraudulent. Under these circumstances the admission in the schedule, coupled with the order of the Court declaring a dividend upon them, is sufficient to establish their claim as creditors. They must be taken to have proved their claims: see also section 44. What right has the

creditor of such Insolvent or Insolvents, may attend the Court, and be heard by himself or counsel, and the Assignee shall produce, for the inspection of the Court, the several statements required by the 41st section of the Act of 11 Vic., c. 21, and all objections to the schedule of the Insolvent, and to the accounts or conduct of the Assignee, and any claims of creditors, which shall not have been previously determined, shall be then heard and determined, either by the Court immediately, or upon a reference to the examiner; and the Court will either declare a dividend, and direct the same to be paid by the Assignee, or will post pone such declaration and direction until a further hearing, and will make such order in the matter as to the Court shall seem fit.

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applicant, who does not allege that these debts are fictitious or fraudulent, to call upon them to give further proof? The *onus* is now on him (if he objects) to establish his objection. Rule 39[1] shows that the fact of no claim having been made to the dividends does not destroy our right to them, or entitle a creditor to ask that they shall be paid over to him.

[BAYLEY, J.:—That rule has been abrogated, and has not been acted on for ten years.]

It was in force in 1870, when the dividend was declared, and even though not now in force it shows that unclaimed dividends are a trust in the hands of the Official Assignee for the creditors on the schedule. Except those creditors are objected to at the proper time, as provided by section 41 of the Act and Rule 36, or their debts are shown to be fictitious or fraudulent, their claim stands good. A claim cannot be expunged—Archibold on Bankruptcy, p 206 Statutory authority to expunge a claim is necessary. There is such in England: see Stat. 12 and 13 Vic., c. 106, sec. 178, but there is none in India.

Lang, for the applicant, in support of the rule —The argument on behalf of the Official Assignee does not distinguish between a claim made and a claim proved. I admit that the Official Assignee is a trustee of the dividends which have been declared. But he is a trustee only for those creditors who

(1) Rule 39 —The Official Assignee shall, on the expiration of six calendar months from the declaration of a dividend, file in Court an account, upon oath, of every dividend then in his hands unclaimed, specifying the names of all creditors to whom such unclaimed dividends are due, as well as the amount of the debt due to each such creditor, and shall publish the same in such numbers of the *Gazette* as shall be first and second successively printed next after such six months; and if any such dividend shall have remained unclaimed for the space of twelve calendar months next following such declaration, every such unclaimed dividend shall be invested in Government securities, which securities shall be deposited with the Sub-treasurer to the credit of the matter of the insolvent estate in which it shall have been declared, accompanied with a memorandum or account specifying each creditor's name to whom each such unclaimed dividend belongs: Provided always, that out of the amount of such unclaimed dividend, accounts so filed and published as aforesaid, the Assignee or Assignees shall deduct the cost and charges of preparing and advertising such account, and that out of the account so to be paid in and credited, he or they shall further deduct the costs and charges of preparing such memorandum or subsequent account.

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have *proved* their claims in the mode provided by the statute and the rules: see Rule 16(1). The mere entry of the debt in the schedule is not enough. Until the required formal proof is given, the alleged creditor has no rights, and cannot be recognised. The claim does not become a debt until proved. Until duly proved, as required by the rules, no dividend would be paid on any claim. The applicant was obliged to prove his claim under Rule 16. It was only to creditors who had proved their claims, and thus made them "debts" that Rule 39 applied. It is suggested that the order declaring a dividend was a recognition of the claims of the creditors in the schedule equivalent to proof of their claim. But that is not so. The order merely declared that a dividend at a certain rate was payable on the total amount of debts shown in the schedule; but that dividend only became due and claimable on such debts as should be duly proved under the rules, and until this was done the Official Assignee would not pay it. My client has duly proved his claim: and he is entitled to ask the Court to give the other claimants a reasonable time to prove their claims, and if they will not, then to strike out their claims altogether. Statutory power is not required for this. The Act could not be worked otherwise: see Archbold on Bankruptcy, p. 195, as to the practice in England, and see Stat. 12 and 13 Vic., c. 136, sec. 164, and see also Robson on Bankruptcy, pp. 374, 375. An order, similar to that we now ask, was made by this Court in the case of *Kessowrám Búpurám*, an insolvent, on the 20th March, 1878, and in the case of *Cándás Núrrondás* on the 13th January, 1886 Counsel referred to *Wild* v. *Banning*(2).

Cur. adv. vult.

25*th January*, 1888. BAYLEY, J.:—In this case a rule was obtained, on the 1st October, 1887, by Kálooram Mahánandrám,

(1) Rule 16 — Every person who shall make claim upon the estate of any Insolvent shall file the same with the Clerk of the Court, and such claim shall be verified by affidavit or solemn affirmation, if the creditor be a person whose solemn affirmation may by law be received in lieu of an affidavit; and no creditor shall be heard in the matter of such insolvency until he shall have so filed such claim and affidavit, or solemn affirmation as aforesaid.

(2) L. R., 2 Eq., 577.

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one of the creditors of the insolvents, calling upon the other creditors to appear and show cause why they should not come in and prove their claims against the insolvents, and in default of such appearance why the names of such creditors should not be expunged from the insolvents' schedule.

The petition of the two insolvents was filed so long ago as February, 1868, and in July of that year they filed their schedule as required by the Statute. From the schedule it appears that the creditors are twenty-six in number, twenty of whom are residents in Karáchi and six in Multán, and that the debts of the insolvents (all of which are admitted, but some of which are of very trifling sums), amount in the aggregate to Rs. 51,819-13. The insolvents obtained their personal discharge on the 15th March, 1869.

It appears that since the date of the insolvency only one dividend has been declared, *viz.*, a dividend of four per cent. in the year 1870; but only one creditor for Rs. 1,500 applied for and received this dividend.

On the 15th July, 1886, the present applicant, who is the largest creditor on the insolvents' estate, for the first time applied for the payment of a dividend on his claim. With reference to this application the Official Assignee in his affidavit says:—

"That one Káloorám Mahánandrám, who lately traded in the name of Dhunirám Bujáji, a creditor on the estate of the said insolvents, applied to me for the first time on the 15th day of July, 1886, for the payment of a dividend on his claim against the estate of the said insolvents, but he was unable after so long a time to adduce any proof in his own possession in support of his said claim. Some correspondence then passed between the attorneys of the said Káloorám Mahánandrám on the one hand and myself on the other on the subject of the said proof, and ultimately I allowed the said Káloorám Mahánandrám to prove his claim from the books of account of the said insolvents which are still in my possession."

Having thus proved his claim against the estate, the applicant, Káloorám Mahánandrám, on the 5th October, 1887, took out the present rule, the substance of which I have already stated.

When granting this rule I ordered that notice of it should be served on all the creditors. It appears, however, that only seven of them have acknowledged the receipt of the notice.

Rule 16 of the Insolvency Rules provides as follows :—

"Every person who shall make claim upon the estate of any insolvent shall file the same with the Clerk of the Court, and such claim shall be verified by affidavit or solemn affirmation, if the creditor be a person whose solemn affirmation may by law be received in lieu of an affidavit; and no creditor shall be heard in the matter of such insolvency until he shall have so filed such claim and affidavit, or solemn affirmation as aforesaid."

None of the creditors, except two, of whom one is the present applicant, have as yet complied with this rule; and the object of the present application is to compel them to do so, or in default to expunge their names from the list of creditors.

There are, then, two questions to be considered, *viz.*, (1) whether this Court has power to make the order asked for, and (2) if it has the power, whether under the circumstances such an order ought to be made.

Now a point was raised during the argument in this matter as to the position of the Official Assignee. He is admittedly a trustee of the property in his hands, but it was contended on the one hand that he was a trustee only for such of the creditors as have proved their claims as required by the rules of this Court; and on the other that he is a trustee for all the creditors admitted on the insolvents' schedule. I think the latter view is the correct one. In the case of *In re General Rolling Stock Company*(1), Mellish, L. J., says that in cases "where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit, the rule is that every body who had a subsisting claim at the time of the adjudication, the insolvency, or the administration decrees, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim,

(1) L. R., 7 Ch. Ap., at pp. 649, 650.

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but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend." It is clear, then, that in this case all the creditors in the schedule are beneficially interested in the assets held by the Official Assignee, and that he holds as a trustee for them all. It is true that in two cases cited by Mr. Lang from the records of this Court I ordered certain claims to be struck out of the schedules filed by insolvents; but in those cases there were affidavits not contradicted, on which it was sworn that the claims in question were fraudulent; while in the present case the claims are admitted by the insolvents, and there is no suggestion by the applicant of fraud in connection with them, and we must, therefore, assume that they are just and valid claims against the estate. All Civil Courts have power to relieve against fraud (Kerr on Fraud, pp. 3 and 4, 2nd ed.), but the question that arises here is as to the power of the Court where there is no fraud, and it is clear that the cases which have been referred to are not in point.

The question, then, is, has this Court power to expunge the names of creditors from the schedule of an insolvent where no fraud is proved or even alleged with regard to their claims?

There is no doubt that the Courts in England have the power to expunge claims under certain circumstances. But this power has been expressly conferred upon them by statute see Statute 6 Geo. IV, c. 16, sec. 60; Stat. 12 and 13 Vic., c. 106, sec. 183; Stat. 24 and 25 Vic., c. 134, sec. 155; Stat. 46 and 47 Vic., c. 52, sec. 39; and Rules 23 and 24 of Schedule 2. It thus appears that the Courts have been authorized to exercise this power since the year 1825. Prior to that year, however, the Courts had no such power. In the case of *Ex parte Graham*(1), which was decided by Lord Eldon in 1813, it was held that "Commissioners cannot expunge a proof. As long as it remains upon the proceedings it must be considered as a debt." So Archbold says: "Before the 6th Geo. IV, c. 16, the Commissioners could not expunge a proof without the consent of the parties, the only remedy was by petition to the Lord Chancellor. Under this clause (he is

(1) 1 Rose, p. 456.

alluding to section 183 of 12 and 13 Vic., c. 106,) the Court may expunge the petitioning creditor's debt, but the Court has authority by this section only where the objection is that the whole or part of the debt proved is not justly due from the bankrupt."(1)

It may be said, however, that the debts of the creditors in the schedule in this case are at present merely claims. They have not as yet been proved. A claim is one thing, a proof is another, and all claims must be proved. From the case of *Ex parte Dobson*(2) it would appear, however, that the Court in England had no power to expunge a claim. That case was decided in 1834, at which time Stat. 6 Geo. IV, c. 16, was in force, which statute, as I have already said, expressly gave the Courts power to expunge in certain cases. Sir George Rose (at p. 668) is reported to have pointedly made the distinction between proof and claim. He said: "The petitioner has not proved, only *claimed*. He has a right to prove;" and in his judgment (see p. 670) the Chief Judge said: "Nor can the other part of the prayer as to expunging the claim be granted." Sir John Cross (at p. 671) said: "Then they ask that the claim may be expunged, to which the respondents object that the Court have no jurisdiction to expunge a claim. I am not prepared to go that length: but it is not necessary here to decide that point." I notice that the marginal note on page 670 is to the effect that "a mere claim cannot be expunged."

The first Indian Insolvency Act was Stat. 9 Geo. IV, c. 73, which was passed in 1828. It is remarkable that this statute does not give the Indian Courts the power to expunge which, as I have pointed out, had been conferred upon the Courts in England only three years before by Stat. 6 Geo. IV, c. 16, sec. 60. The Insolvent Act now in force, (Stat. 11 and 12 Vic., c. 21,) passed in 1848, appears to have been based, to a great extent, upon the Stat. 9 Geo. IV, c. 73. Section 55 of the latter Act, I notice, is almost *verbatim* the same as section 44 of our present Act. But there is not in our present Act, any more than in the former Act, any provision whatever authorising this Court to expunge a claim or a debt from a schedule. How, then, can I hold that this Court has power to do what it is asked to do in

(1) Archbold's Bankruptcy (11th ed.), p. 204. (2) 1 Mon. & Ayr., 666.

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this case? Whether the omission to give this power to the Indian Courts was due to the existence of Act XXVII of 1841, is a point on which I offer no opinion. It has been suggested, I believe, that that Act is no longer in force. It is clear that the Government of India is not of that opinion, for in the volume for 1887 of the "Unrepealed Acts", recently published, I find this Act included.

I hold that I have no power to expunge the names of any of the creditors in this schedule, and I discharge the rule.

Rule discharged.

Attorneys for the applicant:—Messrs. *Payne, Gilbert, and Sayáni.*

Attorneys for the Official Assignee:—Messrs. *Craigie, Lynch, and Owen.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

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May 3.

VISHNU CHINTÁMA'N, (ORIGINAL DEFENDANT), APPLICANT, *v.* BA LA'JI BIN RA'GHUJI, (ORIGINAL PLAINTIFF), OPPONENT.*

Mortgage—Clause of conditional sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee but absolutely—Subsequent suit for redemption barred—Res judicata—Limitation Act XV of 1877, Sched. II, Art. 134—Landlord and tenant—Tenant denying landlord's title—Right of landlord to evict.

In 1863 Báláji and Gyanu mortgaged certain land to one Gopál under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of Gopál, the mortgagee.

In 1871 Gopál filed an ejectment suit against Báláji and Gyanu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to Hari, who now in collusion with the other two defendants, (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopál's title as owner as against

* Application, No. 80 of 1886.

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the mortgagors, Báláji and Gyanu, who claimed a right to redeem. A decree was passed in 1872 ordering Báláji and Gyanu to pay Rs. 100 to Gopál within one month, or, in default, to deliver up to him possession of the land. The money was not paid, and Vishnu, as purchaser from Gopál, got possession in execution of the above decree in August, 1873.

In September, 1885, the plaintiff, as Báláji's heir and legal representative, filed a suit against Gopál and Vishnu to redeem the property. The Court of first instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. In appeal, the Court reversed this decision and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant Vishnu then applied to the High Court under its extraordinary jurisdiction.

Held, that the plaintiff's claim was *res judicata*. In the suit brought by Gopál, (the mortgagee), in 1871 he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them, by way of indulgence, one month within which to regain the land by payment of Rs. 100 to Gopál. It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished. After the lapse of the month Gopál could not have recovered the Rs. 100. Had he sought to recover that money he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed.

Held, also, that the suit was barred under article 134 of Schedule II of the Limitation Act (XV of 1877)—Vishnu having purchased the land for value from Gopál, the ostensible owner, more than twelve years before suit.

A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord.

THIS was an application under the extraordinary jurisdiction of the High Court.

In 1863 Báláji and Gyanu mortgaged the lands in dispute to one Gopál by a mortgage-deed, which provided that, if the mortgage-debt was not paid off at the stipulated time, the mortgagee should become the absolute owner of the property.

In 1871 Gopál sued to eject one Hari from the lands, alleging that having become owner of the property by operation of the *yahán-lahán* clause in the mortgage-deed, he had let the lands to Hari, and that Hari, acting in collusion with Báláji and Gyanu, denied his title. In this suit Báláji and Gyanu were joined as co-defendants with Hari. This ejectment suit was subsequently

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converted into one for a declaration of Gopál's proprietary title to the property, as against the mortgagors Bálāji and Gyanu.

In 1872 a decree was passed in the above suit, directing Bálāji and Gyanu to pay to Gopál Rs. 100 within one month, and, in default, to deliver up to him possession of the mortgaged property. The money was not paid, and Vishnu as a purchaser from Gopál took possession of the property in August, 1873.

In September, 1885, the present suit was filed by Mahádu, the son and legal representative of Bálāji, (now deceased), against Gopál and Vishnu, to redeem the lands from the mortgage of 1863.

The defendants contended that the right to redeem had been foreclosed by the decree passed in 1872; that the plaintiff's claim was *res judicata* under section 13 of the Code of Civil Procedure (Act XIV of 1882); and that it was also barred by the law of limitation.

The Subordinate Judge, on the authority of the ruling in *Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*[1], held that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that his right to redeem was lost. He, therefore, dismissed the suit with costs.

This decision was reversed, on revision, by the Acting Special Judge appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879), who held, on the authority of the ruling in *Rávji Shivrám Joshi* v. *Kálurám*[2], that the plaintiff's suit was not barred by the decree of 1872. He accordingly passed a decree that the plaintiff should recover possession of the lands in dispute on payment of Rs. 100 within six months, or, in default, his right to redeem should be for ever foreclosed.

Against this decision the defendant Vishnu applied to the High Court under its extraordinary jurisdiction.

A rule *nisi* was granted, calling upon the plaintiff to show cause why the decision of the Acting Special Judge should not be reversed.

Náráyan Ganesh Chandávárkar, for the plaintiff, showed cause:—This is not a case for the exercise of the extraordinary jurisdiction

(1) I. L. R., 7 Bom., 467. (2) 12 Bom. H. C. Rep., 161.

of this Court. There is no complaint of excess or declining of jurisdiction. Even if the lower Court be wrong in its decision upon the question of *res judicata*, that error cannot be rectified by this Court, under section 622 of the Code of Civil Procedure. But its decision is not erroneous. The decree in the former suit is not a foreclosure decree. It is a decree which directs payment of the mortgage money within one month, and, in default, the property is to be put in the possession of the mortgagee. It does not provide for foreclosure at all. It does not, therefore, put an end to the relation of mortgagor and mortgagee. *Senhouse* v. *Earl*(1) and *Thompson* v. *Grant*(2) show that a mortgage subsists until the final order for foreclosure is made. Until, therefore, it is proved that the mortgage was distinctly foreclosed, Gopál continues to be a mortgagee. The possession given under the former decree to Vishnu, as Gopál's assignee, was given to him not as owner but as mortgagee. If the mortgage still subsists, we have a right to redeem. Refers to *Periandi* v. *Angappa*(3) and *Karuthasámi* v. *Jaganatha*(4).

Shántárám Nárayan, for the defendant, *contra* :—The right to redeem has become absolutely foreclosed. When a decree specifies a particular time for payment, with a direction for possession, in default, to be given to the mortgagee, the mere lapse of time works as a foreclosure; *Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*(5). Under the English law the final decree for foreclosure is given on an application at the expiration of the specified time. Here no such application need be made. The decree itself operates as a foreclosure. In the former suit, Gopál did not sue as a mortgagee. He sued as an owner. The decree in that suit was substantially a decree for foreclosure. That decree is, therefore, a good defence to the present suit for redemption. The Special Judge has entirely omitted to consider the question of limitation. Even assuming the mortgage to be still subsisting, Vishnu as a *bond-fide* purchaser for value from the mortgagee will be protected after more than

(1) 2 Ves. Sen., 449.
(2) 4 Madd., 428.
(3) I. L. R., 7 Mad., 423.
(4) I. L. R., 8 Mad., 478.
(5) I. L., R., 7 Bom., 467.

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twelve years' possession. He purchased in 1872 and the present suit was filed in 1885 Article 134 of Schedule II of the Limitation Act XV of 1877 applies to the present case. The suit is, therefore, barred by limitation.

WEST, J. :—The Special Judge in the present case raised the two issues of *res judicata*, on which the first defendant Gopál relied, and, further, an issue of limitation, on which, as well as *res judicata*, the second defendant Vishnu relied. On this second issue no judgment has been recorded, and as a judgment was on the Special Judge's decision on the first issue absolutely necessary to the right adjudication of the case as regards Vishnu, the present applicant and the person really interested, we shall have to reverse the decision of the Court below, and send the case back for a fresh disposal by the Special Judge. As we have, then, to take this course, we may properly point out that the Subordinate Judge was right and the Special Judge wrong on the point of *res judicata*.

In 1871 Gopál sued Báláji, Gyanu, and Hari, averring that he had formerly taken certain land in mortgage from the first two, which land had become his property by the operation of a clause of conditional sale *(lahán gahán)*. He had let the land to Hari, who now with the support of the other two denied Gopál's title. In such a suit, the only proper question for the Court was whether, as he alleged, Gopál had given possession to Hari as tenant. A tenant repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord. Nor can other persons by coming in behind the tenant put themselves in the position of possessors, and force the landlord to prove his title. This seems to have been allowed, however, in the instance in question. The suit was changed into one against Báláji and Gyanu on the conditional sale, and the decree given in January, 1872, ordered that Báláji and Gyanu were to pay to Gopál Rs. 100 within a month, or else all three defendants to give him the property sought in the plaint.

By what precise steps this complete transformation of the suit took place we cannot now tell, as the judgment has perished, but the plaint shows that Gopál sued as owner, and the decree directs

delivery of possession to him according to the plaint, unless the Rs. 100 be paid in a month. In the case of *Robinson* v. *Dulcep-singh*(1), James, L. J., says: "The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is the decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them." The plaintiff Gopál having then set up a right as owner through the forfeiture clause, and the defendants insisting on a right still to recover, the decree plainly meant only to give them, by way of indulgence, one month within which to regain the land by payment. It renewed the mortgage, but with a condition which was as material a part of the decree as the advantage to follow on its fulfilment.

The money was not paid, and the property was given to Vishnu, who had purchased from Gopál. The Special Judge has held that Vishnu thus taking in execution in default of payment took as mortgagee, and that the right to redeem still subsisted in 1885, when this suit was brought. But it is plain that had Gopál sought to recover the Rs. 100, or any part of it, he would have been met by the terms of the decree. After the lapse of a month he was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed. The presumption that arises where possession only is sought by a mortgagee, and possession only is awarded, has no application where the plaintiff sues as owner, and the possession is on such a claim awarded to him subject only to a condition in favour of the defendant which the defendant fails to fulfil. No terms were added such as "to hold until payment" or "as security for the sum awarded." The decree, at any rate, when executed by the Court completely transferred the mortgagor's rights to Vishnu.

On this point, therefore, we think the Special Judge was wrong in reversing the decree of the Subordinate Judge. But in the

(1) L. R., 11 Ch. Div., 798, at p. 813.

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VISHNU CHINTÁMÁN v. BÁLÁJI BIN RÁGHUJI.

exercise of the revisional power of this Court we should not have interfered with his judgment on this account, he having acted within his jurisdiction; but that Vishnu has another ground on which to rely, and one that should have been fully considered before judgment was given against him. He purchased from Gopál more than twelve years before the institution of the present suit. Gopál was the ostensible owner, and if Vishnu bought from him for value, he thus acquired a right, which under Schedule II of article 134 of the Limitation Act (XV of 1877) would become unassailable by the mortgagor after twelve years—*Baivákhán Dáudkhán* v. *Bhiku Sázbá*[1]. We have not Gopál before us, nor have we the materials for determining whether Vishnu really purchased from him or not. We will send the case back that the Special Judge may determine on the fact whether Vishnu's purchase is proved, and decide the case accordingly. The rule is made absolute. Costs of this application to be borne by the opponent.

Rule made absolute.

(1) I. L. R., 9 Bom., 475.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. July 6.

GOPI MAHA'BLESVAR BHAT, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHESO MANJU, (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Malicious prosecution—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), Sec. 32—Bombay Act X of 1876, Sec. 15—Prosecution instituted by order of superior officer.

An officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interest is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not

* Appeal from Order, No. 14 of 1887.

assigned to an officer as such, the consent or the order of his superior will not make the act an official one which in its nature is not so, as lying outside his official functions.

The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirsi. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff sent him a notice claiming Rs. 4,500 as damages for the injury done to him by the defendant. The defendant thereupon lodged a complaint before the Divisional Magistrate at Sirsi charging the plaintiff, under section 189 of the Indian Penal Code (Act XLV of 1860), with holding out a threat, &c., to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer, and that, therefore, the Court of the Subordinate Judge has no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by the District Judge only, under section 32 of the Bombay Civil Courts Act (XIV of 1869). He, therefore, dismissed the suit. In appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He, therefore, reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge.

On appeal by the plaintiff,

Held, by the High Court, that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was, therefore, reversed, and the District Judge was directed to dispose of the appeal on its merits.

APPEAL from the order of A. H. Unwin, Acting District Judge of Kánara, in Appeal No. 65 of 1885.

This was a suit to recover damages for malicious prosecution.

In July, 1882, the defendant, an assistant conservator of forests in Government service, prosecuted one Purli Kotraya for

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theft in the Court of the Second Class Magistrate at Sirsi. The plaintiff, a pleader of the Kánara District, conducted the defence on behalf of the accused. In the course of this trial the forest officer used certain expressions, in open Court, towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff, therefore, sent a notice, in writing, to the forest officer, demanding Rs. 4,500 as damages for the wrong done to him.

On the receipt of this notice, the defendant lodged a complaint before the Divisional Magistrate (First Class) at Sirsi, charging the plaintiff, under section 189 of the Indian Penal Code, with holding out a threat to a public servant, for the purpose of inducing him to refrain from doing his duty as such public servant.

The Magistrate, who inquired into this complaint, discharged the accused, (the plaintiff), holding that no offence had been committed by him, and that he was within his right in issuing the notice complained of.

Thereupon the plaintiff filed the present suit against the defendant for malicious prosecution. He claimed Rs. 1,500 damages.

The suit was filed in the Court of the Subordinate Judge at Sirsi.

The defendant replied *(inter alia)* that the prosecution had been instituted by him in his official capacity, and under orders of his superior officers, with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer; and that, therefore, the Court of the Subordinate Judge had no jurisdiction to entertain the suit.

The Subordinate Judge held that the prosecution of the plaintiff, under section 189 of the Indian Penal Code, was instituted by the defendant in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant and as such was cognizable by the District Judge alone,

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under section 32 of the Bombay Civil Courts Act (XIV of 1869). He, therefore, dismissed the suit for want of jurisdiction.

In appeal, the Acting District Judge was also of opinion that, as Government had undertaken the defence of the suit, the Subordinate Judge's jurisdiction was ousted. But he held that the order dismissing the suit was wrong, and that under section 32 of (Bombay) Act XIV of 1869 the plaint ought to have been returned for presentation to the District Court[1]. He accordingly reversed the decree of the Subordinate Judge and referred the plaintiff to the District Judge.

Against this decision the plaintiff appealed to the High Court.

Náráyan Ganesh Chandávárkar for the appellant:—The prosecution, of which the plaintiff complains under section 189 of the Penal Code, was instituted by the defendant, not in his official capacity in the discharge of his official functions, but in his individual character for a wrong personal to himself. The mere fact that he instituted the prosecution with the sanction of his superior officer does not alter the character of the prosecution. The defendant is sued, not in his official, but in his individual, character. The suit is, therefore, cognizable by the Subordinate Judge. Refers to *Venkatráv Shrinivás Kavzalgi* v. *Bápu Rámbaksh*[2]; *Bankat Hargovind* v. *Náráyan Váman*[3]; *Mohan Ishwar* v. *Haku Rupá*[4]; *The Collector of Bijnor* v. *Munwwar*[5].

Rávsáheb *Visvanáth Náráyan Mandlik*, (Government Pleader), for the respondent:—The prosecution was instituted by the defendant under the orders of his official superior. He did not prosecute, except for and on behalf of the Forest Department. He, therefore,

(1) Section 32 of the Bombay Civil Courts Act (XIV of 1869) as amended by section 15 of the Bombay Revenue Jurisdiction Act (X of 1876) provides as follows:—

"No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but in every such case such Judge or Court shall refer the plaintiff to the District Judge, in whose Court alone (subject to the provisions of section 19) such suit shall be instituted."

(2) Printed Judgments for 1875, p. 40.
(3) I. L. R., 11 Bom., 370.
(4) I. L. R., 4 Bom., 638.
(5) I. L. R., 3 All., 20.

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prosecuted in his official capacity And the suit is substantially against an officer of Government for an act done in his official capacity The suit, therefore, falls within the purview of section 32 of Act XIV of 1869 as amended by section 15 of Act X of 1876 As a public officer the defendant is entitled to a notice under section 424 of the Civil Procedure Code Refers to *Shahebzadee Shahunshah Begum* v *Fergusson*[1]

WEST, J —The rulings of this Court in *Venkatrai Shrinivas* v *Bapu Rambaksh* [2] and *Bankat Hargovind* v *Nárdyan Váman Devbhankar* [3] show that an officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor If any particular class of interests is placed specifically under his tutelage with a direction to guard them by the appropriate legal proceedings suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity A similar remark applies to criminal proceedings A prosecution by a functionary in official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law If the duty of prosecuting in any particular case is not assigned to an officer as such the consent or the order of his superior will not make the act an official one, which in its nature is not so as lying outside his official functions Such an order may, however be most important on the question of malice *i e*, a conscious violation of the law to the prejudice of the plaintiff (Broom's Legal Maxims p 311) It may also be important on the question of reasonable cause, and it is to be borne in mind that a plaintiff suing for malicious prosecution has to establish that the defendant had no reasonable cause for the steps taken by him against the plaintiff

In the present case it seems that the prosecution complained of was instituted under the order of the defendant's superior, but that, however important, is not conclusive, as two officers of different rank might conspire to injure an innocent person In

(1) I L R, 7 Calc, 499

(2) Printed Judgments for 1875, p 40 (3) I L R 11 Bom, 370

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such a case each would be responsible for the wrong. It is not likely that such a case would frequently arise, but when it does, no one could say that the conspiracy was an act in the discharge of a public duty. Nor could individual malice be so protected under the English system of law. The allegation of an official justification must be made out by the individual sued as a private person, and it must amount to more than a mere pretext or colour, as good faith is required in the discharge of all public functions that affect the persons or possessions of subjects of the Crown.

For these reasons, we must hold that the defendant, sued as a private person for an alleged wrong to the plaintiff, was rightly sued in the Court of the Subordinate Judge. If the plaintiff has failed to make out the essential points of his case, the District Judge should decide accordingly; but we must reverse his order for giving back the plaint, and direct him to dispose of the appeal on its merits. Costs of this appeal to abide the event.

Order reversed and case sent back.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887.
June 28.

JIVAN BHA'GA, (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* HIRA' BHA'IJI, (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 266 (c)—Building site—Agriculturist bhágdár—Bhágdári Act (Bom. Act V of 1862)—Decree—Execution against bhág.

A having obtained a decree against B, who was a *bhágdár*, attached his *bhág* in execution, including the *gabhán* or site upon which B.'s house was built. B. applied to have the attachment removed from the *gabhán*, on the ground that he was an agriculturist, and that, therefore, the *gabhán* of his house was protected from attachment by clause (c) of section 266 of the Civil Procedure Code (Act XIV of 1882).

Held, that the *gabhán* was subject to attachment, and was not protected by the above clause. B. did not hold as an agriculturist. He could not have occupied the house, except as a *bhágdár*, and it was as part of a *bhág* that the site was attached. The protection of section 266, clause (c), was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.

* Second Appeal, No. 37 of 1887.

1887.

JIVAN BHÁGA v. HIRÁ BHÁIJI.

SECOND appeal from the decree of A. Steward, Acting Assistant Judge at Broach, in Appeal No. 93 of 1885.

One Jivan Bhága obtained a decree against Hirá Bháiji, who was a *bhágdár*, and in execution attached his *bhág*. As a part of the *bhág* he attached the *gabhán* or site of his dwelling-house. Hirá applied to have the attachment raised from the *gabhán*, on the ground that he was an agriculturist, and that, therefore, the *gabhán* of his house was protected from attachment, under section 266 (*c*) of the Code of Civil Procedure (Act XIV of 1882).

This application was rejected by the Subordinate Judge, on the ground that the protection afforded by section 266 (*c*) of Act XIV of 1882 did not extend to a building site.

In appeal, the Acting Assistant Judge held that if the house of an agriculturist judgment-debtor could not be attached under the Code of Civil Procedure, the site of the house was not liable to attachment. He, therefore, ordered the attachment to be removed from the *gabhán* in question.

Against this order the decree-holder appealed to the High Court.

Gokuldás Káhándás Párekh for the appellant:—The Bhágdári Act (Bombay Act V of 1862) provides that a *gabhán* cannot be severed from the rest of the *bhág* in execution of a decree. The Act is, no doubt, intended to prevent the dismemberment of a *bhág*, but the Legislature could never have intended that *bhágs* should not be sold at all. This, however, would be the result if the lower Court's view is adopted. The lower Court has extended the protection given by section 266 (*c*) of the Civil Procedure Code to a building site.

There was no appearance for the respondent.

WEST, J.:—The appellant in this case having obtained a decree against a *bhágdár* attached his *bhág* in execution. As a part of the *bhág* he attached the *gabhán* or site whereon stands the respondent's house. The Assistant Judge has held that the house itself is exempted from attachment, as being that of an agriculturist. The site, therefore, he thought, must be equally exempt;

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and he has decreed that the attachment be raised from the site, even though this should involve the consequence which he foresees that thus the attachment will be defeated altogether through the legally inseparable character of the *bhág*.

Bombay Act V of 1862 provides that a *bhág* shall not be subdivided in execution of a decree, and that a homestead or *gabhán* appendant or appurtenant to a *bhág* shall not be attached or sold apart from it. In section 266 (c) of the Code of Civil Procedure, it is provided that the materials of houses belonging to, and occupied by, agriculturists shall not be liable to attachment. In the case of *Rádhákisan Hakumji* v. *Balvant Rámji* (1) it is said that the building contemplated is one dwelt in by an agriculturist as such. There must be an occupation in good faith for the purposes of agriculture, in order to get the benefit of the exemption. Here the respondent occupies, in one sense, as an agriculturist no doubt, but in a more special sense as a *bhágdár*. Except as a *bhágdár* he could not have held the particular house in question, and it is as part of a *bhág* that the site has been attached. The site does not fall within the words of the Civil Procedure Code, sec. 266 (c); but, apart from that, we have here the Bhágdári Act dealing with a special and very limited class of property. We have also the law of procedure subsequent in date, but of general application, and the terms of the two are such that taken without qualification they might together prevent any execution at all against a *bhág*. This clearly was not intended. The purpose of the more special Act was not that execution should be prevented altogether, but that it should proceed against the *bhág* as an indivisible aggregate, including the *gabhán*; and where a *bhágdár* holds in that character, it predominates over his other character as an agriculturist. He does not hold as an agriculturist, and only as such, and it was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of section 266 (c) of the Civil Procedure Code was intended. This section being thus construed, room is left for the operation of the other Act applicable to this case so as not to defeat the general purpose of the law, and both laws stand

(1) I. L. R., 7 Bom., 530.

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together, the more special operating as a partial exception to the other—*Ex parte Attwater, In re Turner*(1), *Dowling* v *Betjemann*(2); *Fenn* v. *Bittleston* (3), and *James* v. *Cochrane* (4).

For these reasons we reverse the order of the Assistant Judge and restore that of the Subordinate Judge, with costs.

Decree reversed.

(1) L R., 5 Ch Div, 27.
(2) 2 J. & H, p. 544.
(3) 7 Ex, 152
(4) 7 Ex, 170, at p. 171, 174

APPELLATE CIVIL.

Before Mr Justice West and Mr Justice Birdwood

1887. *June* 28.

GOVIND LAKSHMAN JOSHI AND ANOTHER, (ORIGINAL DECREE HOLDERS), APPELLANTS, *v* RAMKRISHNA' HARI JOSHI, (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT *

Vritti—Jotishpanâ vritti—Liability to attachment in execution of a decree—Civil Procedure Code (Act XIV of 1882), Sec. 266 (f)—Nature of vritti under Hindu law.

The *jotishi vritti*, being a right to receive certain emoluments as a reward for personal service, is not liable to attachment under section 266 (*f*) of the Code of Civil Procedure (Act XIV of 1882)

Ganesh Ramchandra Date v *Shankar Ramchandra*(1) followed.

Semble—Under the Hindu law, *vritti* are to be regarded as generally *extra commercium*.

SECOND appeal from the order of E. T. Candy, District Judge of Poona, in Appeal No. 122 of 1886.

In execution of a money decree, the appellants sought to attach and sell the judgment-debtor's future interest in the *jotishi-panâ vritti*. The judgment-debtor objected, on the ground that the *vritti* was not liable to attachment and sale, under section 266 of the Code of Civil Procedure (Act XIV of 1882).

The Subordinate Judge overruled this objection, and ordered execution to issue

* Second Appeal, No 624 of 1886

(1) I L R, 10 Bom, 395

1887.

GOVIND LAKSHMAN JOSHI v. RÁMKRISHNÁ HARI JOSHI.

In appeal, the District Judge, following the ruling in *Ganesh Rámchandra Dáte* v. *Shankar Rámchandra*[1], reversed the order of the Subordinate Judge, and directed the attachment to be raised.

Against this decision the decree-holders preferred a second appeal to the High Court.

Mahádev Bhúskar Chaubal for the appellant:—A *jotishi vritti* is alienable. In *Manchárám* v. *Pránshankar*[2] it was held that a religious office could be alienated within the family. Again, in *Sadáshiv Lalit* v. *Jayantibái*[3], a decree expressly directed a *vritti* to be sold, and the decree was upheld. In Steele's work on Hindu Law and Customs at page 84 it is stated that the duties of a religious office can be performed by a deputy. In the present case the holder of the *vritti* generally entrusts his work to an agent or *gumástá*. If a *vritti* is alienable, then there is nothing, in law, to protect it from attachment in execution of a decree. In this case the judgment-debtor's interest in the *vritti* has been twice before attached and sold. It is now too late to contend that the *vritti* is not liable to attachment.

Dáji Abáji Khare, for the respondent, was not called upon.

WEST, J.:—The appellants obtained a money decree against Rámkrishna, and in execution attached his *jotishi vritti* on three occasions. In 1880 the profits for the year seem to have been appropriated towards the discharge of the debt. In 1883 the sons of Rámkrishna intervened, and procured the release of three-eighths of the profits from attachment. Then in 1884 the plaintiffs attached the whole right of Rámkrishna as *joshi*, treating it as a thing in commerce and subject to sale under the execution against him. The District Judge has held it was not subject to sale, and no case exactly opposed to this decision has been cited. Probably the most correct view of *vrittis* under the Hindu law would be to regard them as generally *extra commercium*, but it does not seem necessary to resort to that principle. Section 266 (*f*) of the Code of Civil Procedure has been construed by the Courts as meaning that the right to take certain emoluments

(1) I. L. R., 10 Bom., 395. (2) I. L. R., 6 Bom., 298.
(3) I. L. R., 8 Bom., 185.

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GOVIND LAKHMAN JOSHI v. RÁMKRISHNÁ HARI JOSHI.

as the reward for personal service is not liable to attachment—*Ganesh Rámchandra Dáte* v. *Shankar Rámchandra*[1]. The right of the *vyavahára joshi* is of this character[2]; and even though he may have authority in some cases to name a *gumáshtá*, or substitute, that does not imply that he can be forced to do so, still less that in consequence his rights are alienable by a forced sale under a decree. We, therefore, confirm the decree of the District Court with costs.

Decree confirmed.

(1) I. L. R., 10 Bom., 395. (2) Steele's L. C., 83, 84.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887.
June 28.

PEDRO ANTONIO DE PENHA, (ORIGINAL APPLICANT), APPELLANT, *v.* JA'LBHOY ARDESHIR SET, (ORIGINAL OPPONENT), RESPONDENT.*

Sale—Proclamation—Civil Procedure Code (Act XIV of 1882), Secs. 274 and 289—Property broken up into lots—Separate proclamations when necessary.

Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided.

A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale.

Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on, or interested in, the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done.

APPEAL from the order of Ráv Bahádur Chunilál Maneklál, First Class Subordinate Judge of Thána, in Application No. 85 of 1886.

One Jálbhoy Ardeshir Set obtained a decree to enforce his mortgage lien by sale of the property mortgaged. The property consisted of land measuring 10 or 11 acres in area. At the request of the judgment-debtor the property was put up to sale

* Appeal, No. 9 of 1887, from order.

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in 22 small lots, in order to realize a better aggregate price. The decree-holder purchased the property for Rs. 14,000.

Before the confirmation of the sale, the judgment-debtor applied to the Court to have the sale set aside chiefly on the ground that the proclamation of sale was not properly made on the spot by beat of drum, so that many intending purchasers did not receive timely intimation of the sale, and the property was knocked down at a grossly inadequate price.

The Subordinate Judge rejected this application, on the ground that no irregularity in publishing the sale was proved.

Thereupon the judgment-debtor appealed to the High Court.

Shámráo Mánekji Rele for the appellant:—The sale is vitiated by a material irregularity in publishing it. The proclamation of sale was not made where the property was situated. The property was divided into a number of lots, and each lot was put up to sale separately. There ought to have been a separate proclamation on each lot. Refers to sections 274 and 289 of the Code of Civil Procedure (Act XIV of 1882), and cites *Tripura Sundari* v. *Durga Churn Pal*[1]; *Gopee Nath Dobey* v. *Roy Luchmeeput Singh Bahádur*[2]; *Kalytara Chowdhrain* v. *Rámcoomár Goopta*[3]; *Showers* v. *Seth Gobind Dass*[4].

Kirkpatrick for the respondent:—The land was going to be sold in one lot, but at the request of the appellant it was put up to sale in 22 small lots. The property is situated within a small area, and the distance between the lots was less than half a mile. The mere breaking up of a property into lots does not make it several distinct properties, so as to require a separate proclamation to be made on each separate lot. Section 274 of the Code of Civil Procedure provides that the proclamation should be made "on or adjacent to the property." This was done in the present case. There was, therefore, no irregularity in publishing the sale. Nor has any loss been shown to have arisen from any irregularity.

WEST, J.:—The proclamation of sale in this case was made without a prior attachment, because the suit had been brought by

(1) I. L. R., 11 Calc., 74.
(2) I. L. R., 3 Calc., 542.
(3) I. L. R., 7 Calc., 466.
(4) I. L. R., 1 All, 400.

1887.

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a mortgagee to enforce payment of the mortgage-debt with which the property was charged. At the request of the mortgagor, the property, which was of an area of between 10 and 11 acres, was divided into 22 small lots as a means of obtaining a better aggregate price. The only objection to the regularity of the proceedings connected with the sale, that has been left in contention at the end of the arguments, is this, that a separate proclamation of the intended sale ought to have been made on each lot into which the property was or was to be divided. Section 289 of the Code of Civil Procedure requires the proclamation to be made where the property is attached. There being here no attachment, we must read the section by analogy as saying "where the property would or might be attached," and that is, by section 274, a spot on or adjacent to the property to be sold. A proclamation orally made on any part of so small an area with beat of drum would be made on a spot "adjacent to" every one of the sub-divisions, *i. e.*, near each one of them, so that even if they are to be regarded as separate properties, the necessities of the law would seem to have been satisfied. A mere breaking up of an area into lots, however, does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done.

We confirm the Subordinate Judge's order with costs.

Order confirmed.

APPELLATE CIVIL

Before Mr. Justice West and Mr. Justice Birdwood.

1887.
July 11.

DEV GOPA'L SA'VANT, (ORIGINAL APPLICANT), APPELLANT, *v.* VA'SUDEV VITHA'L SA'VANT, (ORIGINAL OPPONENT), RESPONDENT.*

Execution of decree—Decree for partition—Civil Procedure Code (XIV of 1882), Sec. 265—Land Revenue Code (Bombay Act V of 1879), Sec 113—Collector's powers in executing partition decrees—Civil Court's jurisdiction to control Collector's action—Practice—Persons not parties to proceedings in appeal not bound by the result of those proceedings.

Decrees in three separate suits for the partition of a certain estate having been referred to the Collector of Ratnágiri for execution under the Civil Procedure Code (Act XIV of 1882), sec. 265, Bhiv Sávant and Rámchandra Gopál, (brother of the first appellant), who were parties to the suits, objected to the Collector's mode of partition, and applied to the Court to set aside the Collector's scheme, and to direct a fresh partition. The Subordinate Judge of Vengurla granted the application, and set aside the partition ordered by the Collector. Against this order Vásudev Vithal Sávant, who was plaintiff in one of the suits, appealed to the District Court, and in the appeal he made Bhiv Sávant alone the respondent. The District Court reversed the order of the Subordinate Judge, and upheld the order of the Collector. Thereupon Bhiv Sávant preferred a second appeal to the High Court against the decision of the District Court. To this appeal neither Rámchandra Gopál nor his brother, the present appellant, were made parties. The High Court having confirmed the decision of the District Court, proceedings were taken to carry out the partition according to the Collector's original scheme. The appellant objected, on the ground that the Collector's scheme had been set aside by the Subordinate Judge, and that he (the appellant) had not been a party to the proceedings in either of the appellate Courts. He contended that he was, therefore, not bound by the decisions of the appellate Courts, and that the order of the Subordinate Judge, setting aside the partition ordered by the Collector, was still in force so far as he was concerned. He, therefore, applied that the property should be divided in accordance with that order. His application was rejected by the Court of first instance as time-barred, inasmuch as more than a year had elapsed since the date of the order of the Subordinate Judge, and during that time the applicant had taken no steps to enforce the order. In appeal, the Acting District Judge confirmed the order of the lower Court, holding that the order of the Subordinate Judge was no longer in force, having been set aside by the High Court. On second appeal to the High Court,

Held, that the appellant was not bound by the final decision of the High Court. The original order being in his favour, he could not be deprived of the benefit of that order without having the opportunity to defend it. Not having been a party to the proceedings in appeal, he was not affected by the result of those proceedings.

* Second Appeal, No. 693 of 1886.

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Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his co respondent, and against whom, therefore, no decree could have been made on a point common to the two, or on any point at all.

Held, nevertheless, that the appellant could not succeed in the present appeal, the object of which was to revive the order of the Subordinate Judge That order was one which the Subordinate Judge had no power to make. It involved taking the execution of the decree for partition out of the Collector's hands into his own, in direct contradiction of the law. In case of partition of lands, section 265 of the Civil Procedure Code (XIV of 1882) and section 113 of Bombay Revenue Code (Bombay Act V of 1879) place the execution of the decree entirely in the Collector's hands This does not deprive the Court of judicial control of its decree; as for instance, if it should appear to have been obtained by fraud or surprise, but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere.

THIS was an appeal from the order of H. Batty, Acting District Judge of Ratnágiri, in Appeal No. 31 of 1885.

The parties to this appeal were, along with others, parties to three different suits for partition of the same property.

In Original Suit 527 of 1865, Ganesh Har Sávant was plaintiff.

In Original Suit 35 of 1866, Rámchandra Gopál was plaintiff.

In Original Suit 36 of 1866, Vásudev Vithal Sávant was plaintiff.

In all these suits decrees were passed for partition of the same property, and execution being applied for, the Collector was referred to, under section 265 of the Code of Civil Procedure (Act X of 1877), for partition of the estate.

When the Collector was about to effect partition, one Bhiv Sávant, who was a party to all the three suits, objected to the Collector's mode of division, and applied to the Court to set aside the Collector's scheme, and direct a fresh partition. In this application he was joined by Rámchandra Gopál, the plaintiff in Suit No. 35 of 1866, and brother of the present appellant. The Subordinate Judge of Vengurla entertained the application, made an inquiry into the matter, and ultimately set aside the partition ordered by the Collector.

Against this order, Vásudev Vithal Sávant, the plaintiff in Suit No. 36 of 1866, appealed to the District Court, and made Bhiv Sávant alone a respondent. The District Court reversed

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the order of the Subordinate Judge, and upheld the Collector's proceedings. The High Court confirmed the District Court's decision in Second Appeal No. 185 of 1883.

The present appellant (Dev Gopál) and his brother Rámchandra Gopál were not parties to the appeal either to the District Court or to the High Court.

After the High Court's decision, when the Collector's original scheme for partitioning the estate was sought to be carried out, the present appellant objected, on the ground that as he was not a party to the proceedings in either of the Appellate Courts, he was not bound by the final decision of the High Court, and that the order of the Subordinate Judge for setting aside the partition ordered by the Collector was still in force so far as he was concerned. He, therefore, applied for a distribution of the property in accordance with that order.

This application was rejected by the Court of first instance, on the ground that more than a year had passed since the order for a fresh partition had been made by the Subordinate Judge, and the applicant had taken no steps to enforce it. The application was, therefore, dismissed as time-barred.

In appeal, the Acting District Judge held that the Subordinate Judge had no power, under the present Code of Civil Procedure, to order the Collector to make a fresh partition, and that even if his order were legal, it was no longer in force, having been set aside by the High Court. He, therefore, confirmed the order of the Court of first instance.

Against this decision a second appeal was preferred to the High Court.

Ghanashám Nilkant for the appellant.—The appellant was not made a respondent in the District Court, nor was he a party to the appeal to this Court. He is, therefore, not bound by this Court's decision. The order appealed against was in his favour. He cannot be deprived of the benefit of that order, without the opportunity of defending it. The Collector acts ministerially in executing a decree of a Civil Court, and his action is subject to the control of the Court whose decree he has to execute—

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Mahádáji Karandikar v. *Hari D. Chikne*[1] and *Lallu Trikam* v. *Bhávla Mithiá*[2].

If a partition is made unfairly by the Collector, it may be set aside by the Court. Refers to *Parbhudás Lakhmidás* v. *Shankarbhái*[3].

The order of the Subordinate Judge for setting aside the division ordered by the Collector was, therefore, legal.

Mánekshán Jáhángirshán for the respondent:—The appellant was sufficiently represented by the other co-sharers, who were respondents before the District Court and appellants in this Court. Section 544 of the Code of Civil Procedure provides for a case of this kind. The appellant was as much interested as the other co-sharers in the proceedings in appeal. And as the order of the District Court proceeded upon a point common to all the co-sharers, he must be held bound by the final decision of this Court —*Bábáji Dhond Shet* v. *The Collector of Salt Revenue*[4]. Under the Code of Civil Procedure a certain discretion is given to the Collector in the execution of a decree. So long as he does not exercise that discretion perversely, the Civil Court cannot interfere and take the execution out of his hands. In the present case it is not alleged that the Collector transgressed the law or contravened the decree. The Subordinate Judge had, therefore, no jurisdiction to order a fresh partition.

WEST, J.:—In this case the appellant, as represented by his brother, now deceased, presented to the Subordinate Judge certain objections to the partition which the Collector was about to make of an estate under a decree. The Subordinate Judge entertained the application, obtained a report from a surveyor, and thereupon made an order for superseding the distribution ordered by the Collector.

An appeal was made to the District Court, where the District Judge reversed the Subordinate Judge's order; and on a further appeal to this Court this decision of the District Court was confirmed. But the present appellant was not a party to either of those appeals. Several applications for execution of several

(1) I. L. R., 7 Bom., 332.
(2) I. L. R., 11 Bom., 478.
(3) I. L. R., 11 Bom., 662.
(4) I. L. R., 11 Bom., 596.

decrees had been consolidated in the Court of first instance; the parties concerned were numerous; and in naming the respondents in the District Court the appellants then omitted the present appellant and his brother, who thus dropped out of the further proceedings.

The effect of the High Court's decree was to re-establish the *status quo ante* the Subordinate Judge's order made on the present appellant's objections. But when it was proposed to give effect to the Collector's original project of distribution, the appellant objected that the order made for setting aside that project—and made on his application—must be regarded as still in force as to him, because he had not been even called on to defend it against the appeal to the District Court. It has been contended before us that as there is a kind of joint interest amongst the parties prejudiced by a decree affecting them on a common ground, such that one party appealing may bind his co-judgment-debtors by the result—*Bábáji Dhondshet* v. *The Collector of Salt Revenue*[1]; so when some of the respondents in the District Court became appellants in the High Court, they represented all the persons in the same interests. But it does not follow that because all who stand on the same right and are similarly affected are bound in an appeal by the result of the judgment between one of their number and the respondent that they should necessarily be bound, without notice, by the steps in a further appeal. If the judgment has been in their favour, they ought not to be deprived of the benefit of it without having the opportunity of defending it. In this case, however, the respondents before the District Court were the appellants here, and though one of them might represent his fellows in a further appeal, he could not represent a person who had not been his co-respondent, and against whom, therefore, no decree could have been made on a point common to the two, or on any point at all.

It cannot, therefore, be held that the first appellant is bound because he was represented in the appeals. The only question would be whether the High Court's decree could be carried out against any of the co-sharers when effect could not be given to it without interfering with the holdings of other co-sharers who had not been parties before the High Court.

(1) L. L. R., 11 Bom., 596.

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But we are asked now to revive the order of the Subordinate Judge, and that cannot be done without contradicting the decree of this Court, since a partition as amongst some of the co-sharers on a particular principle must needs affect all. It is desirable, before we deal with that problem, to consider whether the Subordinate Judge's order was one that he could legally make. Now the Collector no doubt acts ministerially in executing a decree of a Civil Court, but then a certain discretion is allowed to him; and so long as he keeps within the bounds thus prescribed, the Civil Court has no right to replace his discretion by its own. In the case of a partition of lands, section 265 of the Code of Civil Procedure and section 113 of the Bombay Revenue Code (Bombay Act V of 1879) place the execution entirely in the Collector's hands—*Parbhudás Lakhmidás* v. *Shankarbhái*[1]. This does not deprive the Court of judicial control of its decree, as for instance, if it should appear to have been obtained by fraud or surprise; but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere. His order involved taking the execution out of the Collector's hands into his own, in direct contradiction to the law. We cannot resuscitate an order so obviously wrong as this, and we must, therefore, confirm the decree of the District Court. But each party is to bear his own costs throughout the present proceedings.

Order confirmed.

(1) I. L. R., 11 Bom., 662.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

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Penal Code (Act XLV of 1860), Secs. 52, 79, 99, and 342—Act done by a person by mistake of fact in good faith believing himself justified by law— Right of private defence against acts of a public servant acting bond fide under colour of his office—Act XIII of 1856, Sec. 35—Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), Secs. 54, 435, 439—High Court's powers of revision.

On the 29th December, 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M., he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujarátthi marks, and not knowing that such marks are placed on English-made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts, alleging that he had arrested the complainant, because he had assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go.

The complainant then lodged a complaint before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement, offences punishable under sections 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession; and that the scuffle was caused solely by the action of the accused in treating the complainant, without any valid reason, as a suspected thief. The Magistrate convicted the accused of wrongful confinement under section 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment.

Held, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satis-

* Criminal Revision, No. 24 of 1888.

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factory, he acted under a *bonâ-fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in section 52 of the Indian Penal Code (Act XLV of 1860). He was, therefore, protected by section 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under section 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was, therefore, legally arrested, under section 54, clause 5 of the Criminal Procedure Code (Act X of 1882), for obstructing a police officer while acting in the execution of his duty.

Held also, that the High Court will exercise its powers under sections 435 and 439 in the interests of justice, in exceptional cases, as where the enquiry in the lower Court has been faulty.

THIS was an application, under section 439 of the Code of Criminal Procedure (Act X of 1882), for revision of the order of A. W. Crawley-Boevey, Acting Chief Presidency Magistrate.

On the 29th December, 1887, the accused, a police constable, was posted to do duty between 4 and 7 o'clock A.M. near the Arthur Crawford Market in Bombay. At about sunrise (between 6-30 and 7 o'clock) he saw the complainant, a cloth merchant, carrying three pieces of cloth under his arm. Suspecting that they were stolen property, he went up to the complainant and began to question him as to how he had obtained them, &c. The complainant replied that he had brought the pieces from his shop, and that they were of English manufacture. The accused was not satisfied with the answer given by the complainant, especially as two out of the three pieces bore a native name stamped in Gujaráthi characters, and he took hold of one of the pieces of cloth to examine it more closely. The complainant resisted and snatched it from the constable's hand. A scuffle ensued, which ended in the arrest of the complainant. The complainant was then taken to a police station, where he was placed before a Police Inspector. The accused told the Inspector what had happened, stating that he had been assaulted by the complainant. The Inspector, finding that the assault was too trivial to notice, discharged the complainant without taking any

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recognizance or bail and without framing any charges against him. The complainant was in police custody for upwards of four hours.

On the 3rd January, 1888, the complainant laid an information before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement under sections 339 and 340 of the Indian Penal Code (Act XLV of 1860).

The defence was that the complainant had assaulted the accused, and was on this account arrested and kept in confinement until he was discharged by the Police Inspector.

In his examination the accused stated that he suspected the complainant (*1st*) because he was dressed in dirty clothes, (*2ndly*) because one of the pieces of cloth which he was carrying under his arm was soiled, and (*3rdly*) because the cloth bore a Gujaráthi stamp.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain, and that there were no reasonable grounds for suspecting or questioning the complainant at all. He considered that it was immaterial to determine whether the complainant had assaulted the accused, as the scuffle arose solely from the action of the constable in treating the complainant, without any valid reason, as a suspected thief.

The Magistrate convicted the accused of wrongful confinement under section 342 of the Indian Penal Code, and sentenced him to four months' rigorous imprisonment. The Magistrate's judgment was as follows :—

Bhawoo Jiváji, a police constable, No. 1, C division, is charged with wrongfully restraining and confining Mulji Dayál, a Bhátia cloth-broker and shopkeeper. The material circumstances which have led to this charge were thus related by the complainant in his examination-in-chief on the 6th January. (His Worship read a portion of the deposition.) The main facts of the complainant's story are substantially admitted by the accused constable in his examination recorded on the same day. I find it proved, (1) that the complainant was stopped and questioned by the accused regarding three pieces of cloth that he was carrying; (2) that an altercation occurred between them on the subject; (3) that the complainant was ultimately arrested and marched off in ignominy through the streets, first to the Girgaum Police station and then to Dhobi Talav; (4) that he

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was in police custody for upwards of four hours before being finally discharged by Inspector Saunders without any recognisance being taken or charge framed against him.

The defence is that the complainant assaulted the police constable, who on this account arrested him, and kept him in confinement until he was ultimately discharged by his European superior officer. In his examination-in-chief, the complainant admitted that he had a scuffle with the accused :—"I said they (the pieces of cloth) were not stolen. He then commenced to snatch them. I pulled them on one side and he on the other. The sepoy got vexed and caught me by the collar of my coat and said 'I will take you away just now, and I will show you.'" In cross-examination the complainant was further pressed by Mr. Mehtá about this struggle. He denied having struck the sepoy, but admitted that his hand might have gone against his body. (His Worship read the evidence on this point.) For the defence two witnesses were called to prove the alleged assault. Police *rdmosi* Rámlotun, No. 15, says :—"The accused said that something was written on the pieces in Gujaráthi. The complainant got angry, struck the accused on his chest with his open hand, and caught him by the coat. The complainant was then excited. I said to the complainant :—'Let go, why do you altercate with the sepoy.' He then let go the sepoy. The accused caught the complainant by the coat, saying 'You have not replied to my questions, and struck me; come with me to the *chauki*.'" Govind Gunsett, No. 16, a servant employed in the *pán-scopdri* shop where the altercation took place, states as follows :—"The accused said they bore Gujaráthi characters on them. Thereupon the complainant assaulted the accused. Complainant struck him on the chest with his open hand and caught hold of the accused. I was alone in the shop." All the accounts substantially agree about the circumstances under which the altercation between the complainant and accused took place. The police constable for some reason or another entertained, or pretended to entertain, suspicion that the three bundles of cloth carried by the complainant were stolen property.

It is contended for the defence, (1) that the constable was bound to make enquiries and to act, if necessary, under section 35 of Act XIII of 1856; (2) that the suspicion was reasonable (*a*) because it was unusual for persons to be carrying bundles of cloth about so early in the morning, *i.e.* about 6-30 or 7 A. M.; (*b*) because the complainant, though dressed as an ordinary Bhátia merchant with turban and long white coat, had soiled clothes; (3) because the bundles of cloth, though said to be of English manufacture, bore native names stamped in Gujaráti characters. My attention is also directed to Rules 1 and 2 on the subject of posts at page 140 of the General Order Book.

The complainant replies that the grounds alleged were not reasonable grounds for entertaining any suspicion, or for subjecting a person of respectable appearance to a disagreeable cross-examination in the public streets regarding his own goods. Merchants and shopkeepers are, he says, habitually on the move before 7 A.M. The complainant was dressed in ordinary Bhátia dress very unlike the dress usually worn by the criminal classes. Cloth is habitually stamped at Manchester with native names in Gujaráthi characters.

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On the evidence before me, I am bound to say that, even allowing for honest stupidity, I cannot see the slightest justification for the suspicion which the police constable professed to entertain. The proposition that no Bhátiá merchants may carry their own goods in the streets of Bombay before 7 o'clock in the morning, without being subjected to the danger and annoyance of being treated as suspected thieves, seems scarcely worthy of serious consideration. Even the most stupid and ignorant constable in the force very well knows the difference between the dress and general appearance of the ordinary criminal classes and respectable Bhátia shopkeepers in their customary caste dress. The notion that a Bhátia shopkeeper becomes a legitimate object of police suspicion if he wears a soiled coat is also clearly preposterous. An ignorant police constable might doubtless be surprised to learn that cloth made in Manchester was stamped in England with Gujaráthi characters; but ignorance of such facts can hardly be pleaded as an excuse for improper police action; and the public rights of the community cannot reasonably depend upon the ignorance or intelligence of particular native constables. Section 35 of Act XIII of 1856 does, no doubt, leave very much to police discretion; but when this discretion is challenged, each case has to be examined on its own merits, and in the present instance there were, in my opinion, no reasonable grounds for entertaining any suspicion or for questioning the complainant at all. Excluding the hypothesis of wilful misconduct suggested in the information, it would seem that the accused constable, either out of spite, curiosity, or officious inquisitiveness, took it into his head to ask some questions about the cloth that the complainant was carrying. The latter not unnaturally resented the questions as an insult and as a gratuitous imputation on his honesty. I have little doubt that angry words did pass between the parties, and that some kind of scuffle and altercation took place. The complainant and accused have both given their respective versions of what occurred. Whether the scuffle was caused by the constable seizing the cloth and both parties tugging at it; or whether the complainant pushed the constable or struck him a slight blow with the open hand is not, in my opinion, very material, for it is quite clear that the scuffle was caused simply and solely by the action of the constable in treating the complainant without any valid cause whatever as a suspected thief. The constable having provoked the scuffle by the proceedings described could, no doubt, say that he was technically assaulted, and could use this nominal assault as an excuse for arresting and confining a man with whom he had had a quarrel; but under the circumstances described, there was, in my opinion, no legal justification for the arrest; and the manner in which the complainant was confined, and was made to march in ignominy through the streets with his arms tied and the constable's hand on his collar, clearly shows the spirit in which the arrest was made. The complainant has further sworn that the constable kept saying to the passers-by that he had arrested a thief, and that terms of abuse "*sálá*" and "*bhadwá*" were addressed to him by the constable in the public street while he was a prisoner in his custody. I see no reason to doubt the substantial truth of this evidence, which is confirmed in all material points by the witnesses for the prosecution. Even if there was any colourable excuse for arresting the complainant at all, there was certainly none for the manner in which the arrest was effected and

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for the treatment of the complainant while a prisoner in the accused constable's custody Sections 46 and 50 of the Code of Criminal Procedure reproduced in Rules 3 and 4 of the Police Standing Orders relating to apprehensions lay down that— in making an arrest the police officer should actually touch or confine the body of the person to be arrested unless there be submission to the custody by word or action The person arrested should not be subjected to more restraint than is necessary to prevent his escape' In the present case there was apparently the fullest submission to the custody, yet notwithstanding this submission the complainant was subjected to the most humiliating treatment without any apparent reason or excuse Police officers who offer unwarrantable personal violence to persons in their custody are punishable in the Mofussil by section 26 of Bombay Act VII of 1867 I do not find in the General Orders of the Bombay City Police any special regulation on this important subject, but it is clear to me that the circumstances of this arrest were unusual and improper and are susceptible of no legal justification The proceedings that took place at the police station appear to suggest one of two things—either that the alleged assault on the constable was in the first instance not believed at all, or that it was considered so trivial as not to warrant any further proceedings being taken After hearing every thing that the constable and his witnesses had to say Inspector Saunders discharged the complainant (1) without recognizance or bail; (2) without framing any charge against him under the Police Act and (3) without even reporting the case for the information of the Commissioner of Police Although the complainant is now said to have been arrested for the very serious offence of assaulting a public servant in the execution of his duty (section 353, Penal Code) yet no action of any kind was taken to bring the case before the Court or to subject the constable's action to any formal enquiry Mr Mehtá and the police officers concerned appear to be fully conscious that this summary discharge of the complainant after he had thus been ignominiously arrested and kept in confinement for four hours was a weak point in the case and one that plainly needed some justification On this subject Mr Mehtá was instructed to invite my special attention to Rule 2 of the Standing Police Orders on the subject of assault at page 6 of the General Police Order Book. The rule runs as follows "2—Charges preferred by constables of assaults on themselves are to be strictly investigated by the European police officer making the enquiry and discouraged as much as possible especially when the assaults are trifling or the accused is known so that a summons can easily be obtained."

It is obvious that if the complainant was really arrested as Mr Mehtá now contends for an offence under section 353 Penal Code, for assaulting a public servant to deter him from doing his duty this rule has no application at all Offences under that section are serious offences for which the police may arrest without warrant In other words they are cognizable The rule quoted plainly relates to common assaults only which are non cognizable offences and which can only be dealt with by a Magistrate on a summons duly obtained This rule furnishes no justification whatever for the summary discharge of a person who is said to have been arrested for a serious cognizable offence The evidence given by Inspector Saunders on this material point is important (Reads evidence at close of examination in chief) It is clear from his evidence that the

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alleged assault was considered too trivial to notice, and that a charge of "disorderly behaviour" was not framed by Inspector Saunders, because, as he says, the complainant was an old man. If, however, the arrest was justifiable at all, both the parties concerned were entitled to have a further enquiry before a Magistrate; and to discharge a complainant summarily after he had been kept in confinement for four hours, and had been subjected to the greatest humiliation, was an act of very doubtful propriety. Inspector Saunders apparently wishes to suggest that he made the discharge through compassion. He may, however, possibly have been influenced by the consideration that the action of the police constable would not bear enquiry; and that if the complainant were discharged, and the case could be suppressed, it would be expedient for all parties. Whatever his real motive was, I am of opinion that he acted irregularly and contrary to the Standing Orders in discharging the complainant without even reporting the case to the Commissioner of Police, as provided by Rule 6 of the Standing Orders relating to prisoners at page 142 of the General Orders. Under section 54 of the Code of Criminal Procedure, and under section 86 of the Bombay Police Act (XIII of 1856) police officers are empowered in certain cases to arrest without warrant. But such arrests can only be made as a preliminary to subsequent action before a Magistrate; and as in the present case no such action was taken, it is not apparent for what legal purpose the arrest was made, or how the summary discharge of the person arrested can legally be justified. Section 62 of the Code of Criminal Procedure requires the Mofussil police to report all arrests to the District Magistrate. Section 63 prohibits the discharge of persons apprehended "except on his own bond, or on bail, or under the special order of a Magistrate." These two sections have not been made specially applicable to the Bombay City Police, but they show very clearly the view that the Legislature has taken of the duties and responsibilities of police officers who arrest without warrant. Neither by Act XIII of 1856, nor by the English Common Law, is arrest justifiable, except as a preliminary to future proceedings before a Magistrate. This, moreover, is the plain doctrine of the Criminal Procedure Code. A police arrest for an assault of this kind, followed by a summary police discharge, is an arbitrary action unknown to the law. The power of arrest is a necessary incident of a judicial proceeding. It is in a sense a police prerogative which can be used at pleasure irrespective of further proceedings. An arbitrary arrest by a police officer is an act as illegal and as indefensible as a wanton blow with a policeman's baton.

Applying these principles to the facts of the present case, I hold that the arrest and summary discharge of Muljí Dayál by the police constable was arbitrary and irregular. Having once taken the responsibility of arresting him for a serious cognizable offence, the constable was legally bound to go further and to submit the case to magisterial investigation. The responsibility incurred by constables in making arrests is very clearly laid down in Rule 5 of the Standing Orders relating to apprehensions at page 4 of the General Order Book, and in Rules 6 and 7 of the Standing Orders relating to prisoners at page 142. The rules referred to are as follows: Rule 5 (apprehensions)—"Police officers must be most careful in making arrests, as to deprive a person of his liberty is a very serious matter, and great discretion is necessary in all cases where one person charges another with having com-

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mitted a trivial offence." Rules 6 and 7 (prisoners)—"6. When any person has been once placed in confinement, he is not to be discharged except by direction of a Magistrate or the Commissioner or Deputy Commissioner, except in cases where soldiers arrested under section 22 of Act XLVIII of 1860 are made over to the military authorities according to the Standing Orders." "7. The preceding order is not to prevent the detention of any person pending enquiries before a charge is taken. The accused should, if possible, be present when statements are made against him on which the charge is founded. An inspector or constable or any superior officer may on his own responsibility decline to place accused persons in confinement when the circumstances are, in his opinion, insufficient to justify him in doing so, and may permit them to depart, provided they have not been actually placed in confinement." These Standing Orders ought to have been present to the mind of the constable who arrested Mulji Dayál, and of Inspector Saunders who discharged him. In fact, the orders appear to have been entirely ignored. If any assault or other offence had really been committed by Mulji Dayál, nothing would have been simpler than to obtain his name and address and to proceed against him by summons in the legal and regular course. I am satisfied, from the circumstances of the case, that Mulji Dayál was arrested, not from any consideration of public justice, but solely to assert the power of arrest, and publicly to degrade and humiliate a man with whom the constable had quarrelled, or whom the constable for other reasons may have wished to injure.

I have assumed so far that Mulji Dayál was arrested on the ground stated by the defence, but the complainant has from first to last asserted that he was really arrested because the constable suspected, or pretended to suspect, that the three bundles of cloth were stolen property. There is a good deal of evidence on the record to support this view; but it is a fact to be noticed that, although the constable's suspicion, real or pretended, was the occasion of the whole dispute, yet no attempt was made at the police station either to enquire whether the suspicion was reasonable and well founded, or to found any charge against the complainant in respect of the three pieces of cloth. The counsel for the complainant has also drawn my attention to the fact that Inspector Saunders, when dismissing the accused, said nothing whatever about the alleged assault, but told him that he ought to have answered the sepoy politely. In the case of *Queen* v. *Behary Sing*(1), in which it was held that the police had abused their powers of arrest, the Calcutta High Court made the following remarks:—"What is a reasonable complaint or suspicion must depend on the circumstance of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the police any power to arrest persons, as they appear sometimes to do, merely on the chance of something being proved hereafter against them. Any wilful excess by a police officer of his legal powers of arrest is, by section 220 of the Penal Code, an offence punishable by imprisonment for seven years." In another Calcutta case, that of *Queen* v. *Suprosunno Ghosaul*(2), the High Court held, on appeal, that a police officer is not empowered to detain, without question, any accused person for a period not

(1) 7 Calc. W. R. Cr. Rul. 3 at p. 5 (2) 6 Calc. W. R. Cr. Rul., 88.

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exceeding twenty-four hours, but rather he is in no case justified in detaining a person for one single hour except on some reasonable grounds warranted by the circumstances of the case. The time during which a person is wrongfully confined by a police officer is material only in fixing the punishment for the offence. The same doctrine is laid down in Mayne's notes on wrongful confinement at page 242 of the 6th edition.

I have entered at some length into the legal aspects of this case (1) because the subject of police arrest is intrinsically one of great public importance; (2) because the law relating to this subject in the city of Bombay is far less clear and distinct than the law laid down for Mofussil police officers by the Criminal Procedure Code. The special needs of great commercial cities require that the police should be invested with extensive powers of enquiry; and section 35 of Act XIII of 1856 arms the Bombay City Police with enormous discretionary power in the case of goods which may reasonably be suspected of having been stolen or fraudulently obtained. This section is a very useful one for the general protection of the community; and it enables the police to act effectually against the habitual criminal class. But it is at the same time susceptible of very great abuse, as it may also be used at pleasure against all classes of the community alike, and leaves enormous power in the hands of native policemen of all ranks. I have had occasion several times to compliment native constables on their intelligence and dexterity in acting under this section; and I think it creditable to the Bombay City Police that this is the first case of serious abuse that has come under my notice; but when a respectable Bhátiá shopkeeper can be treated in the public streets of Bombay as the complainant in the present case was treated, the public interest requires that serious notice be taken. It is to me a matter of satisfaction that the native police constable has received the benefit of the ablest advice, and has been very skilfully defended by Mr. Pherozesháh Mehtá. The case has thus received more exhaustive inquiry than would otherwise have been possible, and if my view of the law and of the standing police orders be correct, I trust that the inquiry will lead to useful results. For the reasons assigned in this judgment, I can entertain no reasonable doubt that the accused did wrongfully restrain and confine Mulji Dayál within the meaning of the Indian Penal Code. I find him, therefore, guilty of the charge, and I order him to be rigorously imprisoned for four months.

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction. The Court sent for the record and proceedings of the case.

Farran and *P. M. Mehtá* for accused.

Jardine and *Mánekji B. Dádábhái* (with *Ghanashám Nilkanth*) for complainant.

Latham (Advocate General) for the Crown.

Farran :—The accused constable was improperly convicted.

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Section 35 of Act XIII of 1856[1] by inference authorises the police to make such inquiries as the accused did on the occasion in question. By one of the police rules, framed under section 8 of the Act, constables are expressly required to direct their attention to persons carrying parcels or bundles at unreasonable hours, and says that on sufficient grounds the property may be searched.

[BIRDWOOD, J.:—Were these rules issued by the authority of the Commissioner of Police?]

I cannot say, but I am instructed that they were sanctioned by Government. These rules impose on the police a delicate and difficult task, in the performance of which *bonâ-fide* mistakes must sometimes occur. The question now is, was the action of the accused constable *bonâ fide* or not.

[BIRDWOOD, J.:—The accused was convicted of wrongfully restraining the complainant; and the question is, whether the arrest was legal.]

The Magistrate held that the inquiries made by the accused were entirely out of the province of the police, that the blow which the complainant struck was, under the circumstances, justifiable, and consequently the accused had no right to arrest him for that blow.

[BIRDWOOD, J.:—The Magistrate seems to have thought it was not a matter of much importance whether the blow was struck or not.]

Yes, because he thought that this was an inquiry such as the police had no right to make.

[BIRDWOOD, J.:—As far as I can understand, the defence of the accused was that he only arrested the complainant after he was struck.]

Yes, up to that time I submit that the accused was performing the duty which devolved upon him of making inquiries in

(1) "35, *Clause* 1.—Whoever has in his possession, or conveys in any manner, any thing which may be reasonably suspected of being stolen or fraudulently obtained, shall, if he fail to account satisfactorily how he came by the same, be liable to a penalty not exceeding one hundred rupees, or to imprisonment, with or without hard labour, for any term not exceeding three months."

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his capacity of a police officer. He found that the answers were not satisfactory, and when he was struck by the complainant he arrested him. The hour at which the occurrence, which gave rise to this case, took place is not clearly stated. But it could not have taken place much later than half-past six o'clock, and it was not yet daylight.

[BIRDWOOD, J.:—The question whether it was dark or not at the time,—that is, whether it was an unusual time for an honest man to be carrying a bundle,—is very material[1].]

The sun rose at 6-34 o'clock. According to the prosecutor himself, his shop did not open till about 8 o'clock. At the time when the arrest took place the prosecutor was loitering. One of the three bundles of grey piece-goods which he was carrying was soiled. The constable wanted to examine the bundle, and for that purpose he apparently laid his hand upon it, and thereupon the prosecutor struck him a blow more or less violent. The Magistrate found as a fact that there was a scuffle, but he did not find as a fact whether a blow was struck or not. The police constable himself said that he had arrested the prosecutor because he had struck him. The prosecutor's hands were tied with a handkerchief, and he was taken to the police station. On the way the accused was assured, on the evidence of independent persons, that he had made a mistake in arresting the man on suspicion, and the moment he received that assurance he removed the handkerchief from his arm. That is an important piece of evidence with regard to the *bona fides* of the accused. The complainant having been arrested under these circumstances, the accused had no power to release him, and for what the Inspector did when the complainant was placed before him, the accused cannot be held responsible. The question is whether the circumstances justified the accused in making the inquiries. The Court will have to consider whether there was a reasonable or proper cause for making inquiries. Whether the circumstances were such as justified the institution of inquiries is a question of law.

[BIRDWOOD, J.:—The case of *Panton* v. *Williams*[2] lays down that what is a reasonable and probable ground for suspicion is a

(1) See *Lawrence* v. *Hedger*, note *infra*, page 399. (2) 1 G. & D., 504.

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mixed question of law and fact.] In *Johnstone* v. *Sutton* (1 Term. Rep., 545,) it was said: "Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact, but whether, supposing them true, they amount to a probable cause, is a question of law."]

The circumstances which would justify a constable in making inquiries are quite different from those which would lead him to arrest a person.

[BIRDWOOD, J., referred to *Davis* v. *Russell*[1].]

In *Hailes* v. *Marks*[2] it was held that the question of reasonable and proper cause was for the Judge and not for the jury. But the true view is taken by Mr. Pollock in his work on Torts, page 192, where he says that the "reasonable cause for suspicion to justify arrest is—paradoxical as the statement may look—neither a question of law nor of fact. Not of fact, because it is for the Judge and not for the jury; not of law, because no definite rule can be laid down for the exercise of the Judge's judgment." See also *Isister* v. *Perryman*[3]. In *Beckwith* v. *Philby*[4] the facts were very similar to the present case, and a distinction is laid down between action by a private individual and action by a constable. In order to justify an arrest by the former, it must be proved that felony had been committed, while the constable could detain a person on a reasonable ground for suspicion.

[BIRDWOOD, J.:—As to arrest by a constable, that is also the law here; and a reasonable suspicion is something more than a bare surmise. It must rest, as was said in *Queen* v. *Behary Sing*, (7 Calc. W. R., Cr. Rul., 5), on some definite fact tending to throw suspicion on the person arrested.]

Jardine:—This case has been argued as if it were a regular appeal. The authorities show that there should be no revision by the High Court unless exceptional circumstances in the case call for intervention—*Queen Empress* v. *Shekh Sáheb Badrudin*[5];

(1) 5 Bing., 354.
(2) 4 I. R. H. L., 521.
(3) 7 H. & N., p. 56.
(4) 6 B. & C., 635.
(5) I. L. R., 8 Bom., 197.

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Nobin Krishna Mookerjee v. *Rassick Lall Laha* (1); *In re Juggut Chunder*(2); *Queen Empress* v. *Ala Bakhsh* (3). No case for review has been made out. It has been said that the Magistrate did not appreciate the evidence properly, but this is no ground for revision.

The evidence shows that the Magistrate's finding was perfectly correct. Section 35 of Act XII of 1856, under which the accused acted, points out *reasonable* suspicion as the indispensable ground of action. There should be reasonable suspicion of theft or fraud before one can act under the section, and the point now is whether there was any reasonable suspicion in the mind of the accused. The evidence shows that the complainant, dressed as a respectable shopkeeper, walked along the streets with his own goods under his arm, between half-past six and seven o'clock in the morning. The time was not at all unusual. It was not midnight or early morning when thieves are said to commit their depredations and remove property.

BIRDWOOD, J.:—The Magistrate has found, on the evidence in this case, that the complainant, a Bhátia cloth-broker and shopkeeper, was stopped and questioned by the accused, a constable of the Bombay police force, regarding three pieces of cloth that he was carrying; that an altercation occurred between them; that the complainant was ultimately arrested and marched off in ignominy through the streets, first to the Girgaum Police station and then to Dhobi Talávy, and that he was in polic ecustody for upwards of four hours before he was finally discharged by Inspector Saunders without any recognizance being taken or charge framed against him. In his examination before the Magistrate, the accused said that he had taken the complainant into custody because he had assaulted him. The complainant denied that he had struck the accused, but admitted that he had a scuffle with him and that his hand might have gone against the body of the accused. It was contended for the accused, in the Court below, that he was within his rights in making enquiries about the cloth, as the complainant was carrying it at an unusual time, that is to say, at about 6-30 or 7 A.M., and that the circumstances were such as to justify a reasonable suspicion that the cloth was stolen

(1) I. L. R., 10 Calc., 1047. (2) I. L. R., 2 Calc., 110.
(3) I. L. R., 6 All., 484.

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property, the complainant's clothes being soiled and the pieces of cloth having been described by him as of English manufacture, whereas they bore a native name, stamped in Gujaráthi characters. The Magistrate, however, could not see the slightest justification for the suspicion which the accused professed to entertain, and was of opinion that the complainant not unnaturally resented the questions put to him as an insult and as a gratuitous imputation on his honesty. He was further of opinion that it was not a very material point in the case whether the complainant pushed the constable or struck him a slight blow with the open hand, as it was quite clear that the scuffle was caused simply and solely by the action of the accused in treating the complainant, without any valid cause whatever, as a suspected thief. Here, we think, the Magistrate erred in his view of the law, for, assuming for the moment that the action of the accused was quite illegal up to the moment when he put his hands on the cloth, on failing to receive what he considered satisfactory answers to the questions put by him to the complainant, still that would not justify the blow struck by the complainant, if he really did strike the accused, and not merely come in contact with his body or push him while scuffling with him in the endeavour to save his bundle of cloth. If the action of the accused was illegal, the complainant could legally struggle to free himself and his property; but section 99 of the Indian Penal Code would not justify his voluntarily causing hurt to the accused. If the Magistrate had found, as a fact, that the complainant struck the blow described by two of the witnesses for the defence, then there would have been an end of the case, for the accused would, in that event, have been certainly justified in arresting the complainant.

It is only in very exceptional cases that this Court sitting as a Court of Revision deals with questions of evidence, and disturbs or supplements the finding of a lower Court on a question of fact—*Queen Empress* v. *Shek Saheb Badrudin*[1]. It will do so, in the interests of justice, where the enquiry in the lower Court has been faulty—*Nobin Krishna* v. *Rassick Lall*[2]. In the present case, if it were necessary to do so, we would ourselves be prepared to consider the evidence bearing on the particular circumstance

(1) I. L. R., 8 Bom., 197. (2) I. L. R., 10 Calc., 1047.

relied on at the trial as a justification of the arrest, because, in trying the case, the Magistrate has admitted a good deal of evidence on the record as to the respectability of the complainant which would have been admissible only if it had appeared that the complainant was known to the accused, and necessarily known to him as a respectable person, before the morning on which he was arrested. This evidence ought to have been rejected at once. The Magistrate seems to have become aware, as the case proceeded, that it was not relevant; but, after it had once been admitted, it is impossible to say that the impression made by it on his mind as to the character of the complainant may not have induced him to attach undue weight to some parts of his evidence relating to the conduct of the accused. Moreover, in referring to the question whether the alleged assault could have been serious or not, the Magistrate seems to have had regard rather to the opinion regarding the nature of the assault held by the accused's superior officer than to the evidence regarding it adduced at the trial, which ought to have furnished the only material for a decision on the point. However, we can dispose of the application before us without either deciding ourselves, or requiring the Magistrate now to decide the question whether, as a matter of fact, the complainant struck the accused in the manner alleged or not.

We think that, in dealing with the case, the Magistrate has been led to a wrong decision from failing to consider aright the question whether the accused acted in good faith in questioning the complainant and putting his hand on his bundle of cloth. The accused has been convicted, under section 342 of the Indian Penal Code, of wrongfully confining the complainant, *i.e.* of voluntarily obstructing him from proceeding in a direction in which he had a right to proceed, and preventing him from proceeding beyond certain circumscribed limits. Assuming, then, that the complainant did not strike the accused, but merely struggled with him in order to free his property, the arrest of the complainant would be an offence against the section if the complainant was, in law, justified in resisting the action of the accused in putting his hand upon his property. That the com-

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plainant was justified in resenting the questions put to him, we cannot for a moment hold, for it is quite clear to us that the questions were put, not for the purpose of annoying the complainant, or from mere idle and officious curiosity, but in order to remove an honest suspicion in the mind of the constable that the bundle might be stolen property. The accused did not know the complainant, and could not, we think, have acted from any malicious motive. He was at his post, where he was required to be from 4 A.M. to 7 A.M., his special duty being to prevent the removal of stolen property by thieves attempting to evade the police. He saw the complainant, who was waiting for a tram-car, with the cloth under his arm, at about half-past six o'clock, or perhaps a little later, on the morning of the 29th December *i.e.*, apparently about sunrise. We cannot say that the contention of the counsel for the accused in the Court below that that was an unusual time for persons to be carrying bundles is without weight The accused himself said in his examination that he suspected the complainant, because he was dressed in dirty clothes, and because the uppermost of the three pieces of cloth was dirty. If he had an honest suspicion, as we think he had, then, even though the same facts might not have raised any suspicion in the mind of a police officer of higher grade, still he acted, we think, with due care in putting questions the answers to which might clear away his suspicions. The putting of questions under these circumstances was in itself an indication of good faith, as defined in section 52 of the Penal Code. He said at the trial that he received no answers to his questions. It is to be regretted that he was not questioned further as to what he meant by saying so, whether he meant, for instance, that at first he received no answers or whether he meant that he received no answers at all; for he certainly told Inspector Saunders the answers which were given him and adduced witnesses at the trial, who deposed to the conversation which took place. He certainly obtained answers to his questions, and was evidently not satisfied with those answers, and then he seems to have put his hand on the bundle and was resisted by the complainant. He may have shown a want of intelligence in not accepting as satisfactory the complainant's answer that

the cloth was of English manufacture, though it bore a name stamped in Gujaráthi characters; but we do not doubt that this answer did not satisfy him as to the honesty of the complainant. He himself, as we think, believed that he was legally justified in detaining the cloth; and though he was entirely mistaken as to the character of the complainant, we think that his belief as to his legal right was a *bonâ-fide* belief, and that he is protected by section 79 of the Penal Code (Act XLV of 1860).

We also think that, under the first paragraph of section 99, the complainant had no right to resist the accused when he tried to detain the cloth. The decision of the case really turns upon the question whether the accused acted in good faith; and that question must be considered with reference to the position of the accused and the circumstances under which he acted. If he acted with due care and attention such as ought to be expected from a constable in his position, in the circumstances in which he was placed, then he acted in good faith; and even though his act might not have been "strictly justifiable by law,"—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence, as the accused was a public servant acting under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt: see *Reg.* v. *Venkatráo*[1]. The question of good faith, as far as it is one of fact, we are prepared in this case to deal with ourselves. We think, as we have already said, that the accused was justified in questioning the complainant; and we think further that he is not liable to be dealt with as a criminal, because, after endeavouring to satisfy himself whether his suspicions were well founded or not, he was not satisfied by such answers as he received, though such answers might have satisfied a more intelligent man, or one in a higher position, and because he, thereupon, proceeded to put his hand on the property which he believed to be stolen, whether he did so with the intention of further inspecting it, or of arresting the accused for being in possession of it. We cannot hold that the

(1) 7 Bom. H. C. Rep. Cr. Ca., 50.

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law exacts the same care and attention from all public servants regardless of the position they occupy. If the same intelligence were required from a constable as from a Commissioner of Police, it would be impossible to obtain the services of constables on the salaries which the State gives them for such duties as are performed by the accused. We are forced, therefore, to consider whether there was some ground for suspicion, and whether the accused, in the circumstances in which he was placed, acted with such care as is sufficient to shield him from a criminal prosecution. Though we think that there was very little ground, indeed, to justify a reasonable suspicion that the cloth was stolen property, yet we think that there was some ground which gave rise to an honest belief on the part of the accused, after such inquiry as he was able to make, that such a state of facts existed as would justify his action. We think, therefore, that the Magistrate ought to have found in this case that the accused acted in good faith, and that even though his act might not be strictly justifiable by law, the complainant had no right to resist him. As he obstructed the accused while acting in the execution of his duty, the arrest was legal under section 54 of the Code of Criminal Procedure (Act X of 1882).

We therefore reverse the conviction and sentence, and acquit the accused of the offence of which he has been convicted, and direct that he be set at liberty. We express no opinion as to the legality of the action of Mr. Inspector Saunders in discharging the complainant without reporting the case to the Commissioner of Police, as we do not think that that question, though discussed by the Magistrate, is one which affects the legality of the arrest made by the accused.

PARSONS, J.:—The admitted facts of this case are few and simple. The accused, a police sepoy, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A. M. About 6-30, or between that time and 7, he saw the complainant there, carrying under his arm three pieces of cloth. Being suspicious as to whether these cloths might not be stolen property, he went up to the complainant and began to question him about them. The complainant answered the questions ap-

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parently truthfully. One of the answers, however, was that the cloths were made in England. Now the cloths bore Gujarâthi names on them, and the accused, who did not know (as well as he might not) that such names were placed on English-made goods, presumed from this that the answer was a false one, and that the goods were stolen property. He did not, however, at once proceed to arrest the complainant, but took hold of one of the pieces of cloth in order to look at it more closely. The complainant objected to this. He held the cloth and obstructed the accused, and there was a scuffle, each trying to obtain possession of the cloth. It was after this that the accused arrested the complainant. The after facts are not material, but it may be stated that the accused took the complainant to a European Inspector, to whom he narrated the facts, distinctly stating that he had arrested the complainant because he had assaulted him, and that the Inspector, on seeing that the complainant was an old man, and on the accused saying that he was not hurt, let the complainant go. The disputed fact in this case is, whether there was an actual assault, that is, whether the complainant struck the accused a blow. With this fact I shall, if necessary, deal later on, as well as with the competency of this Court to go into such a question of fact. The Magistrate considered that it was not material to decide the point, but, on the admitted facts, he convicted the accused of the offence of wrongful confinement, and sentenced him, under section 342 of the Penal Code, to four months' rigorous imprisonment. The question before us is as to the legality of this order and sentence.

Now it is quite clear, from the judgment of the Magistrate itself, that he has erred in his mode of dealing with the case, inasmuch as he has not really considered whether the accused was guilty of a criminal offence. In his judgment he has not alluded in any way to the protection that the law affords to an act done by a person who, by reason of a mistake of fact, in good faith, believes himself either to be bound by law to do it, or to be justified by law in doing it (sections 76 and 79 of the Penal Code); nor, indeed, has he alluded to the provision of law that there is no right of private defence against an act

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which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. (Section 99 of the Penal Code). The Magistrate has thus decided the case as if it were a civil action to recover damages instead of a charge of a criminal offence, and has convicted the accused, although he has nowhere found that the accused was not acting in good faith. The whole case really turns on this point, namely, whether the accused did act in good faith. If he did, then he is not criminally guilty, however wrong and civilly liable his action may be. If he did not, then he would be guilty of an offence, unless, of course, he arrested the complainant in consequence of a distinct assault upon himself. This, then, is the point which has first to be considered, whether the accused, in arresting the complainant, acted in good faith; in other words, with due care and attention. (Section 52 of the Penal Code). Complainant's counsel has argued that his client was a respectable tradesman, and at the time of his arrest well dressed and engaged in his ordinary occupation at a usual hour, that a police officer has no right whatever even to question such a person as to any thing he might be carrying in his arms, that the accused in questioning him acted without the slightest possible shadow of a suspicion, and that therefore his client had a perfect right to use force and prevent the accused overpowering him and taking away his cloths. No doubt it is true that the law does not, in so many words, give a police officer power to question persons in order to ascertain if the goods they are in possession of are stolen. It, however, assumes, I imagine, that every person has the right to speak to another. It gives an officer in charge of a police station the power to arrest any person who cannot give a satisfactory account of himself. (Section 55, Criminal Procedure Code of 1882.) This presupposes some kind of questioning. The law also gives any police officer power to arrest any person in whose possession any thing is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. (Section 54, Criminal Procedure Code, and sections 86 and 35 of Act XIII of 1856). I do not think that it could

seriously be contended that, under either Code, a police officer, who has the power of arrest, must at once exercise the power, and that he has not the power, prior to the arrest, of asking any questions, the answers to which might serve to show him whether or not his previously aroused suspicions were correct. I should have thought that the very fact that such questions were put would go to show that the police officer was acting with care and attention, and not hastily and inconsiderately. The words "reasonably suspected" in section 54 of the Criminal Procedure Code are of course important. If it could be shown that the accused knew the complainant before this to be a respectable tradesman; if the complainant was at the time well dressed, and if it is a fact that persons who carry stolen property are either not well dressed or dressed differently to the complainant, or if it appeared that the time at which the complainant was seen was usual and consistent with his business, then no doubt it might be plausibly argued that the accused could have had no reason to suspect him; but it is admitted that the accused did not know and had never seen the complainant before; it is not shown that possessors of stolen property are always badly dressed or wear any particular garb; and it is stated by the complainant himself that the time at which he was out was early for his business, from which I gather that it was not usual either for himself or other traders to be carrying about pieces of cloth at that time.

It would not, however, be sufficient in this case merely to show that the accused had no reason for suspicion in the light of after-events; for the accused can show that circumstances exist from which it can be seen that, in suspecting the complainant, he was acting in good faith, that is, with due care and attention. I have said that the accused was on duty at a temporary post. These posts are established from 4 to 7 A. M., "in order to prevent the removal of stolen property by thieves attempting to evade the police." One of the rules of the police force is that "constables must direct their attention to persons carrying parcels, bundles, &c., at unreasonable hours or under suspicious circumstances, and if there are sufficient grounds, such bundles are to be searched," and the police officer is instructed in the same rules that "he may stop,

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search, and detain any person suspected of having any thing stolen or unlawfully obtained." It would not, I think, be easy to hold that the accused acted without due care and attention by merely obeying these rules, which are framed and sanctioned by Government under section 8 of Act XIII of 1856 and which have been in force for many years past. In the trial of the case itself, it has never been suggested that the accused was actuated by any malice. The complainant does, indeed, in his information say that the accused was instigated by other persons to arrest him in order to ruin his business, but this allegation was not supported, and there can be no doubt that it is false. It is not stated in the judgment of the Magistrate, nor, indeed, have I heard it stated in the whole course of the argument, that the accused did not honestly believe that he was justified in law in first questioning, then detaining, and subsequently arresting the complainant. The case of the complainant and the ground of the conviction are that the arrest was bad, because there never were any reasonable grounds to justify the accused in suspecting at the outset that the complainant was carrying stolen property; but as I have said above, that might justify an award of damages in a civil suit; it would not of itself be sufficient to justify a conviction of a criminal offence. If the accused can show that he was acting with due care and attention, and that he in good faith believed that his suspicion was a reasonable one, and that he was justified by law in questioning the complainant and searching his bundle, and in arresting him, he is entitled to an acquittal. This is so independently of the attempt of the complainant to prevent the accused looking at his bundle of cloths, for if the accused would not be criminally liable had he arrested the complainant before the complainant attempted to obstruct him in the exercise in good faith of his duty, how much more is the accused protected when it is found that he did not arrest the complainant until after the complainant had so obstructed him. No doubt the complainant was naturally indignant at being asked about his bundle, but he should have remembered who his questioner was. The general security of the public is to be considered of more importance than the occasional detention of a person like the complainant, who, if as in this

case unjustly arrested, can very speedily clear himself. In suspecting the complainant, and in proceeding to examine the cloth more closely, I am clearly of opinion that the accused is shown to have been acting in good faith in the execution of his duty. Against his acts, even if not strictly justifiable by law, there would be no right of private defence of property at all, and none of person, unless the acts were such as to cause the apprehension of death or of grievous hurt. The acts of the accused in this case, even if directed against the person of the complainant, were not such. The complainant was, therefore, not justified in refusing to allow the accused to inspect the cloth, in snatching it from him, and in scuffling with him, and he must be considered in so doing to have obstructed a police officer whilst in the execution of his duty. It would be a perilous thing to hold that any person, however well dressed, could refuse to allow a bundle which he was carrying to be inspected by a police officer, who entertained a reasonable suspicion of its contents and could support that refusal by force. For the obstruction caused to him while in execution of his duty the accused could under section 54 (5) of the Criminal Procedure Code arrest the complainant. Whether, therefore, the arrest be considered as the result of the complainant being reasonably suspected of having stolen property in his possession as the Magistrate appears to consider, or as an arrest in consequence of the accused having been obstructed in the execution of his duty as the accused says it was, and as there is ample evidence on the record to show that it was, in either case my opinion is that the conviction of the accused for an offence under section 342 is not sustainable in law. It is, therefore, unnecessary for me to consider the point as to whether the arrest was or was not made in consequence of a distinct assault committed by the complainant. I concur in reversing the conviction and sentence and in ordering the accused to be acquitted and discharged.

Conviction and sentence reversed.

Note.—See the case of *Lawrence* v. *Hedger*(1), where the plaintiff passing through the streets of the city of London with a bundle in his hand about 10 o'clock P.M. was stopped by a watchman, who took him to the defendant, a

(1) 3 Taunt at pp. 14, 15 and 16.

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beadle, who asked him what he had in his bundle and who gave the bundle to him. The plaintiff replied that he did not know, and that he was carrying the bundle to his sister in *St. George's Fields*; and referred him to a house there. The defendant did not inquire there but sent the plaintiff to the *Poultry Compter*, charging the gaoler there with the prisoner in the name of Stevens the constable, for the night. The next morning the sitting alderman discharged the plaintiff. It was contended for the plaintiff that the power of detention and imprisonment being given to the constable of the night only, the beadle had no authority to detain and imprison him. It was held by Heath, J., that it would be extremely mischievous if the defendant could not be considered sufficiently a constable for the performance of the duty; that any watchman might have detained the plaintiff, and that it was the constable's duty to secure him when so apprehended. "At every *Old Bailey* Sessions," he said, "numbers of persons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way." Lawrence, J., said: "A woman walking up and down the streets to pick up men, a night walker, may be apprehended; yet her's is a much less offence than is here suspected." Chambre, J., said: "In the night, when the town is to be asleep, and it is the especial duty of those watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise."

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1888.
January 21.

PA'LLONJI SHA'PURJI MISTRY, PLAINTIFF, *v.* EDWARD VAUGHAN JORDAN, DEFENDANT.*

Civil Procedure Code (Act XIV of 1882), Secs. 235, 295, 490—Application for execution, necessity of, in order to share in distribution under Section 295—Attachment before judgment, effect of—Decree—Execution—Decree-holder with an attachment before judgment must after decree apply for execution under Section 235 in order to share in distribution.

A decree-holder who has attached before judgment is not entitled to rank under section 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution and as such to obtain, in execution, a rateable share of the property which he has attached, unless, subsequently to his decree, he has applied for execution under section 235 *et seq.* of the Civil Procedure Code.

Under section 230 of the Civil Procedure Code all decree-holders if desirous of enforcing their decrees are required to apply for execution. There is no exception of cases arising under section 490.

* Suit No. 464 of 1887.

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Section 490 of the Civil Procedure Code (Act XIV of 1882) does not *by implication* confer upon a decree-holder who has attached before judgment the right to come in under section 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution.

APPLICATION in chambers. This was an application by the plaintiffs in Suit No. 464 of 1887, under section 295 of the Civil Procedure Code (Act XIV of 1882), to be allowed to share rateably in certain moneys realised in execution of a decree obtained against the defendant in Suit No. 358 of 1887. The other parties entitled were the plaintiffs in Suit No. 358 of 1887, Suit No. 501 of 1887, and Suit No. 509 of 1887, respectively. The money in question had been realised (paid into Court) on the 23rd December, 1887. The plaintiffs in the three last mentioned suits had applied for a rateable distribution under section 295, and, in accordance with the practice of the Court, had obtained from the Prothonotary certificates stating the names of such persons as within a year prior to the realisation had applied under section 235 of the Civil Procedure Code for execution of their decrees. The names of the present applicants were not included in those certificates, and they now applied to the Judge in chambers to have their names inserted, and to be allowed to share rateably in the property realised, on the ground that, although they had not applied for execution under section 235, they had attached the property in question before judgment.

The defendant was an officer in the service of the G. I. P Railway Company, and there was a sum of Rs. 10,462-6-0 in the hands of the Company belonging to him. On the 4th October, 1887, a decree was obtained against him by the plaintiffs in Suit No. 358 of 1887 for Rs. 5,000. They subsequently applied for execution under section 235 of the Civil Procedure Code (Act XIV of 1882), and on the 24th October attached the above sum in the hands of the Company.

On the 21st November, 1887, the present applicants filed their suit (No. 464 of 1887), and on the next day (22nd November, 1887), they obtained an attachment before judgment. They obtained a decree for Rs. 5,000 on the 16th December, 1887, but made no

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application for execution under section 235 subsequently to the date of their decree.

On the 17th December, 1887, the plaintiffs in Suit No. 358 of 1887 took out a summons calling upon the G. I. P. Railway Company to show cause why, out of the defendant's money in their hands, which had been attached by them as above stated on the 24th October, 1887, a sufficient sum to satisfy their decree should not be paid into Court. The plaintiffs in Suit No. 464 of 1887 who, as above stated, had attached this money before judgment having become aware of the granting of this summons, appeared at the hearing before the Judge in chambers on the 22nd December, 1887, and consented to the following order. It was entitled in both suits:—

"Upon reading the Judge's summons in Suit No. 358 of 1887, dated 17th instant, and on hearing Messrs. Nánu and Hormasji, (attorneys for plaintiffs in that suit), in support of the said summons; and Mr. Little on behalf of the G. I. P. Railway Company, who explains that there are other suits and claims against the defendant; and Mr. Bomanji and Hormasji, (attorneys for plaintiffs in Suit No 464 of 1887), on behalf of the plaintiffs in Suit No. 464 of 1887, who consent to this order,—I do order that the proper officer of the G. I. P. Railway Company do further pay to the Prothonotary the sum of Rs. 10,462-6 standing to the defendant's credit, &c., &c."

This order was signed by the attorneys for plaintiffs in Suit No. 358 of 1887 and Suit No. 464 of 1887, respectively.

On the 23rd December the plaintiffs in Suits Nos. 501 of 1887 and 509 of 1887 respectively obtained decrees against the defendant, the former for Rs. 6,250 and the latter for Rs. 5,100, and in the afternoon of that day they applied for execution under section 235 of the Civil Procedure Code.

On the same day, *viz.*, the 23rd December, the G. I. P. Railway Company paid the said sum of Rs. 10,462-6 into Court.

Early in January, 1888, the plaintiffs in Suit No. 501 of 1887 applied for a rateable distribution of the Rs. 10,462-6 which had been paid into Court. Before doing so they obtained a certificate

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from the Prothonotary setting forth the names of the persons who had applied for execution of their decrees within a year prior to the realisation of this money, *viz.*, the 23rd December, 1887. As above stated, the present applicants (plaintiffs in Suit No. 464 of 1887) were not included in the certificate, inasmuch as they, relying on their attachment before judgment, had not subsequently to their decree made an application for execution under section 235. They now applied to be allowed to share rateably, contending that by reason of having already attached the property (*i.e.*, before judgment) they were exempt from the necessity of making a fresh application for execution under section 235 after obtaining their decree.

Latham, (Advocate General), for the applicants:—We contend that as at the date of our decree the property was under attachment by virtue of an order for attachment before judgment and is still under that attachment, it was not necessary for us, after we had obtained our decree, to make a fresh application for execution under section 235—*Gamble* v. *Bholágir*[1]. The procedure for attaching property before judgment, as laid down in section 483 *et seq.* of the Code, is similar to that for attaching property after decree: see section 230 *et seq.* In *Sri Rammanik* v. *Tincowri Rai*[2] it was held that a new attachment was necessary. But subsequently to that decision the Code of Civil Procedure (Act XIV of 1882) was passed; and the new section 490 was inserted. Our case comes under that section. That section converts an attachment before judgment into an attachment after judgment. An application for execution under section 235 is not an attachment. It is only a step taken towards obtaining an attachment: see clause (*j*) of section 235. To hold that we must be ousted from a share would be to add an exception to section 490, to the effect that, unless a party who has attached before judgment shall take some steps after decree to re-attach the property, he shall take nothing under section 295. When section 490 says "it shall not be necessary to re-attach," it must mean it shall not be necessary to take any step towards re-attachment, *e.g.*, by applying for attachment under

(1) 2 Bom. H. C. Rep., 147. (2) 4 Beng. L. R., 63, F. B. Rul.

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section 235; otherwise the provision is absurd. The application under the section must be refused if made. Then what is the use of making it? Section 490 must be read with section 295. We contend that an attachment before judgment is more than an equivalent to a mere application for execution under section 235, *e. g.*, by attachment: see clause (*j*).

Next, we say that if an application is necessary, what we have done is equivalent to an application, and should be regarded as one. We are parties to the order made on the 22nd December, 1887, under which the property in question was realised (see above)—*Lakshmi* v. *Kuttunni*[1]; *Viraragava* v. *Varadá*[2]; *Gangá Din* v. *Khushálí*[3]. In this last case the Court draws a distinction between an attachment and an application under section 295. It holds that such an application is not equivalent to attachment so as to prevent alienation of the property. From that it follows that there can be an attachment without a previous application for execution under section 235. The above cases show that in such a case as this any application is sufficient to entitle a claimant to share, and the application need not satisfy the requirements of section 235.

Inverarity for the decree-holder in Suit No. 501 of 1887 *contra*:—In order to enable creditors to share under section 295, they must, previously to realisation, have applied for execution under section 235. That application must formally set forth the particulars indicated by the section. The applicants contend that what they have done should be regarded as equivalent to an application under the section. But they have not given to the Court any of the important information required by the sub-clauses of section 235. An application under section 235 is not necessarily an application for attachment: see clause (*j*). Section 490 has no reference to rateable distribution under section 295. It was passed to protect the creditor against the Official Assignee. The attachment of the applicants is good for that purpose, but worthless under section 295. It is clearly necessary that a formal application under section 235 shall be made and recorded under

(1) I. L. R., 10 Mad., 57: see pp. 60, 61. (2) I. L. R., 5 Mad., 123.
(3) I. L. R., 7 All., 702.

section 245. How, otherwise, is the Court to know who are entitled to share? Further, unless such application appears on the register kept under section 245, the Court cannot receive any other evidence that such application has been made: Evidence Act (I of 1872), sec. 91.

The applicants made no application. Their consent to the application made by the plaintiffs in Suit No. 358 of 1887 is not equivalent to an application.

Farran, on the same side, for the decree-holders in Suit No. 509 of 1887:—We also oppose this application. Section 295 is not an insolvency section. It does not provide for distribution among all creditors, but only those of a certain class. That class is comprised of those only who have obtained decrees and have applied for execution All others are excluded. The application for execution must be under section 235. Where is the applicant's application giving the Court the prescribed information? Their application (clause *j*) should state the nature of the assistance they require. Under section 245 the Court might reject their application, but as they have never made an application there has been no possibility of rejecting it. How can they be said to have done something equivalent to an application?

The consent by the applicants to the order of the 22nd December is not an application. The application must be in writing.

SCOTT, J.:—Does section 490 enable the holder of an attachment before judgment to rank under section 295 as an applicant in execution against the property attached after a decree is given in his favour, or is he still obliged to apply for execution under section 230 and the sections which follow the chapter of the Code upon execution of decrees?

Section 490 does not, in express terms, confer the right, but the Advocate General maintained that it is given by implication. The words of the section are "it shall not be necessary to re-attach the property in execution of such decree." No application for attachment, therefore, is necessary. The attachment before judgment enures, and becomes an attachment in execution. That is the effect of the section.

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Can a person holding such an attachment in execution proceed to a sale in execution of his decree; or are there other conditions to fulfil? Chapter XIX deals with execution generally, and I turn to it for the answer to this question. Section 223 says: "A decree may be executed under the provisions hereinafter contained," *i.e.*, contained in Chapter XIX. Section 230 next says: "When the holder of a decree desires to enforce it, he *shall* apply to the Court which passed the decree or to the officer, if any, appointed in this behalf" This section does not reserve or except a case arising under section 490. It applies to all holders of decrees. Section 235 says that the application shall be in writing, and shall contain certain particulars—ten in number—among which ranks "the mode in which the assistance of the Court is required, whether by delivery of the property, or by arrest and imprisonment, or by attachment of property."

Now, section 490 already has given such attachment to the decree-holder. So that in a case under section 235, when attachment of property is the mode of assistance required, the application for execution at first sight would seem unnecessary. But other particulars are also required by the section, such as, for instance, whether an appeal has been filed—whether there has been any adjustment since decree, and whether there has been any previous application for execution. These requirements are evidently treated as essential; for section 245, in substance, says that if the requirements of section 235 (amongst others) are not complied with, the Court may reject the application, and section 245 goes on to say that the Court will only order execution of the decree after the application has been admitted. Then, lastly, section 295, which deals with the rateable distribution of assets, says they shall be divided rateably among all persons who have, prior to the realisation, *applied to the Court for execution*. Reading these sections together, their meaning is quite clear on the point in question; and the construction suggested by the learned Advocate General would, in my opinion, be a departure from that meaning. I am, therefore, forced, somewhat reluctantly, to the conclusion that an application for execution is necessary before section 295 can include the case, under section 490, of the

holder of an attachment before judgment, until he has made his application he only holds a security, which may be destroyed by the interposition, after decree has been given, of a *jus tertii*. It seems hard that a person who holds an attachment in execution should not rank *pari passu* with other judgment-creditors. But the law lays down a certain procedure as a condition precedent to the right of any decree-holder to rateable distribution, which the others have followed, and he has not.

I must, therefore, reject this application. I may add, that this decision is supported by the practice of the Court for the last eleven years. There have been no decisions which directly settle the question; none, that is to say, with reference to section 490, as bearing upon section 295. But there are decisions which show that the observance of the rules of procedure laid down in the chapter on Execution in the Code is essential to a claim for rateable distribution—*Tiruchittambala Chetti* v. *Sheshayyangár*(1); *Vishvanáth Maheshvar* v. *Virchand Pánáchand*(2).

I cannot hold that there was anything done by the applicants which could be regarded as an application for execution. The summons on the 17th December was taken out by the plaintiffs in Suit No. 358 of 1887, and the applicants only consented to the order made in that summons. That order for payment into Court was, no doubt, made in both suits, but that circumstance does not make their consent amount to an application for execution.

Application rejected.

Attorneys for the applicants:—Messrs. *Bomanji and Hormasji.*

Attorneys for the other parties:—Messrs. *Little, Smith, Frere, and Nicholson,* and Messrs. *Nánu and Hormasji.*

(1) I. L. R., 4 Mad., 383 (2) I. L. R., 6 Bom., 16.

ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Scott.

1888.
February 24.

IN *RE* JAIKISSONDA'S PURSHOTAMDA'S, PETITIONER.*

Practice—Presidency Small Cause Courts Act XV of 1882, Secs. 38 and 71—Rehearing, application for—Compliance with requirements of Act subsequently to application for rehearing—Rule of Court No. 208.

An application to the High Court for a rehearing under section 38 of the Presidency Small Cause Courts Act XV of 1882 must be in writing.

A decree was passed against the petitioner by the Court of Small Causes on the 9th December, 1887. On the 16th December counsel on his behalf was instructed to apply to the High Court, under section 38 of Act XV of 1882, for a rehearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days, their Lordships before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on, it appeared (1) that the petition had not been signed and declared until the 17th December 1887, (*i.e.* the day after the application had been made in Court); (2) that the affidavit in support of the application as required by section 38 had not been filed until two days after the application in Court; and (3) that the Court fees which by section 71 of Act XV of 1882 should be paid prior to the application had not been paid until the 20th December 1887, *i.e.* four days after the application.

Held, that the application for a rehearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made.

THE petitioner was the defendant in this suit brought against him in the Bombay Court of Small Causes, and a decree was passed against him by that Court on the 9th December, 1887.

Counsel was instructed on his behalf, on the afternoon of the 16th December, to apply to the High Court, under section 38 of the Presidency Small Cause Court Act (XV of 1882), for a rehearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section which requires the application to be made within eight days,

* Small Cause Court Suit, No. $\frac{246}{26985}$ of 1887.

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their Lordships (Bayley and Scott, JJ.,) before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. The matter now came on for disposal.

On the case being called on, the Registrar informed the Court, first, that the petition for a re-hearing, which was requisite under Rule No. 208 of the High Court Rules(1), had not been signed and declared until the 17th December, 1887, *i.e.*, the day after the application had been made in Court, secondly, that the affidavit in support of the application as required by section 38, had not been filed until two days after the application in Court; thirdly, that the Court fees, which by section 71 of Act XV of 1882 should be paid prior to the application, had not been paid until the 20th December, 1887, *i.e.*, four days after the application.

Jardine for the petitioner:—The application has been made by us and received by the Court within the eight days required by section 38, and should now be heard upon its merits. The Court should not refuse to hear the application, because of the informalities which admittedly have occurred in making it. With regard to the first objection, *viz.*, that the petition was not declared until the 17th December, that is of no importance. The application was made on the 16th December orally to the Court. Section 38 does not forbid an oral application. An application under section 37 is always oral. The words used in these two sections are similar, and should receive a similar construction. No doubt the rule of this Court, No. 208, prescribes that the application under section 38 shall be by petition. That rule is *ultra vires* if it is held to limit the right given by the section to apply either orally or in writing. There is nothing in the Act to show that the application should be signed or verified. As to the second objection, *viz.*, that the affidavit was not filed at the time the application was made, the section does not require that to be done. The affidavit has since been filed. It

(1) Rule 208.—Applications under the Presidency Small Cause Courts Act, XV of 1882, section 38, shall be made by petition, which must be filed in the Prothonotary's office within eight days from the date of the judgment complained of, accompanied by a precipe to set down the matter before the Division Court hearing appeals from the decrees and orders of the Judges of the High Court exercising Original Civil Jurisdiction on the first day it shall sit.

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was actually handed in on the day the application was made, and my client is not responsible for the filing of it in the office. As to the third objection with respect to the fees, it is true the fees had not been paid when the application was made. But that was merely an oversight. The petitioner and those who advised him were unaware that the Act required that the fees should be paid prior to the application. They were paid shortly afterwards, and if the objection had been taken by the officer of the Court, they would have been paid then and there. So the question is, whether under these circumstances the application having been actually received, this Court will now hold that the non-payment of fees prior to the application nullifies the application. Although the strict requirements of the Act have not been complied with, the Court can hear the application—*Park Gate Iron Company* v. *Coates* [1]; *Waterton* v. *Baker* [2]. If the Court rules against us on these points, I apply under section 5 of the Limitation Act XV of 1877.

BAYLEY, J.:—I think we must reject this application. No doubt section 38 of the Act does not say, in express words, that an application for re-hearing under that section must be in writing, but reading that section with section 71 I think we must hold that the intention was that such an application should be in writing. If, however, there was any doubt about the matter, I think the doubt has been cleared up by the rule (No. 208) framed by the Judges of this Court, which provides that the application shall be by petition. We are now asked to say that this rule is *ultra vires*. We are not prepared to come to that conclusion.

Then, what are the circumstances under which this application is made? We find that although the application was nominally made on the 16th December, the petition was not signed or declared until the 17th December; that the affidavit in support of it was not filed until two or three days subsequently; and that the fees were not paid until the 20th December. Even assuming that section 5 of the Limitation Act (XV of 1877) applies to such a case as this, I do not think that any facts are shown to

(1) L. R., 5 C. P., 634. (2) L. R., 3 Q. B., 173.

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justify us in exercising the discretion given to us by that section in favour of the applicant. I think the application must be rejected.

SCOTT, J.:—I concur. I am also of opinion that if section 5 of the Limitation Act applies, there are no circumstances here which should induce us to extend the time prescribed by section 38 for making such an application as the present.

I think, also, that it should be clearly understood that; although this application was nominally made on the 16th December, it was only provisionally received; and that every objection to its reception which could have been taken on that day can be taken now. The subsequent compliance by the petitioner with the requirements of the Act cannot place him in a better position than he occupied when the application was made. There is no doubt that if these objections had been then taken, the application must have been rejected, and, consequently, I think we must reject the application now.

Application rejected.

Attorneys for the petitioner:—Messrs. *Payne, Gilbert, and Sayáni.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *July* 18.

VENKÁPÁ NA'IK, (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* BASLINGA'PA' BIN KOTRABASAPA, (ORIGINAL SURETY), RESPONDENT.*

Surety—Stay of execution of decree appealed against on giving security—Security for fulfilment of appellate decree—His liability—Mode of enforcing it—Civil Procedure Code (Act XIV of 1882), Secs. 253 and 583—Execution proceedings—Separate suit—Words "in an original suit" in Section 253 of Act XIV of 1882 superfluous.

Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject.

* Appeal No. 87 of 1886.

1887.

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Reading section 253 with section 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under section 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under section 253 to satisfy a decree of a Court of first instance

The words "in an original suit" in section 253 may be treated as a superfluous expression.

APPEAL from the decision of Ráv Bahádur G V Bhánap, First Class Subordinate Judge of Dhárwár, in *darkhást* No. 188 of 1886.

The appellant Vankápá Náik obtained a decree against Shankarbhárathi Swámi in Original Suit No. 326 of 1881 in the Court of the First Class Subordinate Judge of Dhárwár. Against this decree an appeal was preferred to the High Court. Pending the appeal the execution of the decree was stayed on the judgment-debtor's furnishing security for the satisfaction of the decree of the Appellate Court. One Baslingápá became his surety. The High Court confirmed the decree of the Court of first instance. Thereupon the decree-holder sought, in execution, to enforce the decree both against the judgment-debtor and the surety.

The surety objected to the execution of the decree against him, on the ground that he, having become a surety after, and not before, the passing of the decree in the original suit, the decree could not be enforced against him, in the same manner as against the judgment-debtor, under section 253 of the Code of Civil Procedure (Act XIV of 1882)(1).

The Subordinate Judge was of opinion that the provisions of section 253 of the Code of Civil Procedure could not be extended in their operation to the case of a person who became a surety for the fulfilment of the decree in appeal He held that the proper mode of proceeding against the surety was by a regular suit, and not by a summary process in execution. He, therefore, refused to issue execution against the surety.

(1)Section 253 of Act XIV of 1882 provides as follows :—"Whenever a person has, *before the passing of a decree in an original suit*, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant Provided a sufficient notice in writing has been given to the surety."

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Against this order the decree-holder appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellant:—Section 253 should be read with section 583 of the Civil Procedure Code. Section 583 distinctly provides that decrees in appeal should be executed in the same manner as decrees in original suits. Under Act VIII of 1859, sec. 204, a surety could be proceeded against in execution, whether he became a surety before or after the passing of the decree in the original suit—*Nárayan Dev* v. *Gajánan Dikshit*(1); *Shivlál Khubchand* v. *A'páji Bhivrár*(2); *Apáji Bhivrár* v. *Shivlál Khubchand*(3); *Sheo Gholám Sahoo* v. *Rahut Hossein*(4). Under the present Code of Civil Procedure it has also been held that the decree-holder can proceed in execution against the surety who has bound himself to fulfil the decree in appeal—*Bans Bahádur Sing* v. *Mughla Begam* (5).

Mánekshá Jehángirshá for the respondent:—The rule in section 253 is a special rule of procedure applicable to a special case. It is not to be extended by analogy to other cases of a like nature. It provides that a person who becomes a surety before the passing of the original decree is to be treated as though he were a party to the suit. The same cannot be said of a person who becomes a surety after the decree. He is not a party to the suit, nor a party to the appeal. The ruling in *Báboo Rám Kishen Doss* v. *Hurkhoo Sing*(6) shows the distinction between the two classes of sureties. This ruling is followed in *Gayindra Náráyan Roy* v. *Hemangini Dossi*(7). These cases must have been before the Legislature when it framed section 253 of the present Code. If we compare it with the corresponding section of the old Code—section 204, we at once perceive the change of expression. In section 253 of the present Code there are the words "in an original suit" which are not to be found in section 204 of the old Code (VIII of 1859). These words are advisedly put in to remove all possibility of doubt on the

(1) 10 Bom. H. C. Rep., 1.
(2) I. L. R., 2 Bom., 654.
(3) I. L. R., 3 Bom., 204.
(4) I. L. R., 4 Calc., 6.
(5) I. L. R., 2 All., 604.
(6) 7 Calc. W. R. Civ. Rul., 329.
(7) 4 Beng. L. R., 27 Appx.

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subject. Those words prevent the application of the section to the case of a person becoming a surety *after* the decree.

Ganesh Rámchandra Kirloskar in reply:—The change in the wording of section 253 does not imply any change of intention or procedure. The ruling in *Gajendranáráyan Roy* v. *Hemangini Dasi*[1] is practically overruled by a subsequent case, *Akhut Ramana* v. *Ahmed Yousuffji*[2]. There is nothing to be gained by driving the decree-holder to a regular suit against the surety. It would be only prolonging litigation unnecessarily.

WEST, J.:—The cases cited in argument make it clear that under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. In the case of security taken after decree, and when no litigation between the parties was actually pending, a difference seems to have been recognized in some instances, but it is not necessary to discuss those cases at present. In the new law embodied in Act XIV of 1882, section 253 says that execution of a decree in an original suit may proceed against one who has become surety for its satisfaction pending the suit, in the same manner as against the defendant. Section 583 again says that the Court shall on due application execute a decree in appeal "according to the rules hereinbefore prescribed for the execution of decrees in suits." This should apparently empower the Court to proceed against a surety for the fulfilment of the decree in appeal who has accepted that obligation under section 546 in the same way as against a surety who has become liable under section 253 to satisfy a decree of a Court of first instance. No reason could be adduced by the respondent's pleader why a surety in the one case should not be subject to the same liabilities as in the other, and the necessity for a prompt execution is the greater in proportion as the previous contest has been prolonged.

But it is contended that the express insertion of the words "in an original suit" in section 253 implies that, should security be

(1) 4 Beng. L. R., 27 Appx. (2) 7 Beng. L. R., 81, A. C.

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taken otherwise than in an original suit, the rule is not meant to be applied. There is undoubtedly some weight in this argument, and it seems to have been felt on some occasions as having great force, but we should have expected a very material change of the law to have been more clearly indicated than by this uncertain inference. It would be a change at variance with general harmony of principle in the Code, and on that account also should have been very plainly expressed. The argument that the mere adoption by section 583 of the rules of execution prescribed for decrees in original suits does not imply the adoption of a substantive rule as to the liability of a surety, does not seem to be of any weight. If the liability and the mode of enforcing it could properly be dealt with in one section of a Code of procedure, it could with equal propriety be adopted in another section of the same Code. The mere introduction of the words "in an original suit" will not, we think, bear the stress put upon them. The case of *Hough* v. *Windus*[1] shows that the use of a superfluous word or phrase is an insufficient ground for an inference of a special intention of the Legislature.

The forms framed by this Court under section 652 of the Code have the force of law, except where they are inconsistent with the Code. The form of surety bonds prescribed and followed in the present case was drawn up under this power. It makes a surety directly liable to the Court, not merely to the judgment-creditor. Such a rule is not inconsistent with the provisions of the Code, though it supplements them. It has been in operation for many years without question.

The surety, therefore, is, we think, directly liable, as is the judgment-debtor under the final decree, and we accordingly reverse the decree in execution of the Subordinate Judge, and direct that the application as against the respondent be dealt with in the execution proceedings. Costs of this appeal to be borne by the respondent.

Order reversed.

(1) L. R., 12 Q. B. Div., at p. 228.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. July 19.

VINA'YAK AMRIT, *DESHPA'NDE*, (ORIGINAL DEFENDANT), APPELLANT, *v.* A'BA'JI HAIBATRA'V, (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree—Declaratory decree—Execution—Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.

In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant 12 *per cent.* of the rents and profits of a certain *inám* village. The decree also awarded mesne profits from the date of the institution of the suit.

In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84.

Held, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a terminus *ad quem* as well as *à quo*, and in the absence of a special order the terminus was the date of the decree.

THIS was an appeal from the order of Ráv Bahádur Ganpatráo A. Mánkar, First Class Subordinate Judge of Sátára, in *darkhást* No. 1153 of 1884.

The plaintiff filed a suit in 1864 to recover his share of the income of certain *inám* villages according to the terms of an old partition deed of the year 1817, supplemented by a subsequent agreement made between the parties in 1833. He asked *(inter alia)* for a yearly payment of Rs. 1,237-12-0 in perpetuity out of the revenues collected by the defendant

The Court of first instance passed a decree in plaintiff's favour, declaring him entitled to receive yearly from the defendant one-fourth of the income of the village of Bichukli, and that he was also entitled to a fourth share of the income of two other *inám* villages, *viz.*, Sonake and Arle.

On appeal, the High Court in 1878 amended this decree by declaring that the plaintiff was entitled to 12 *per cent.* of the revenues of Bichukli and 16 *per cent.* of the revenues of each

* Appeal, No. 91 of 1886.

of the two villages Sonake and Arle, and that the plaintiff was entitled to recover mesne profits from date of the institution of the suit[1].

According to the shares thus fixed by the High Court's decree, the parties divided the income of the villages until the year 1882. A dispute then arose, which led to the present *darkhást* (No. 1153 of 1884).

By this *darkhást* the plaintiff sought to recover, in execution of his decree, his share of the rents and profits of the village of Bichukli for the years 1882-83 and 1883-84.

The Subordinate Judge ordered the defendant to pay to the plaintiff Rs. 603-13-10 with costs.

Against this order the defendant appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellant:—The plaintiff has obtained a merely declaratory decree, establishing his right to a certain share in the rents and profits of three *inám* villages. The decree, no doubt, awards mesne profits, but it gives them only up to the date of the decree. It cannot be extended beyond that date. The plaintiff claims what he terms mesne profits for 1882-84. That claim is not included in the decree. The decree does not command us to pay for those years. The plaintiff cannot, therefore, recover his share for those years by execution proceedings. He has mistaken his remedy. His proper course was to bring a separate suit. Refers to *Vishnu Shámbhog* v. *Manjámma*[2].

Mahádev Chimnáji Á'pte (with him *Gangárám Bápuobá Rele*) for the respondent:—The plaintiff sought for an annual payment in perpetuity of a certain share of the income of the villages. The Court of first instance substantially granted this prayer. That part of the decree is not reversed or modified in appeal. Effect has been given to the decree by annual payments in accordance with it as an order to pay in perpetuity. The decree is, therefore, capable of execution. A separate suit is not necessary.

(1) See Printed Judgments for 1878, p. 293. (2) I. L. R., 9 Bom., 108.

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VINÁYAK AMRIT DESHPÁNDE v. ÁBÁJI HAIBATRÁV.

WEST, J. :—The plaintiff in this case no doubt sought a decree which should award payment to him by the defendant in perpetuity of a certain part of the produce of the village of Bichukli. But what was decreed by the Court of first instance was that the plaintiff had a right to an annual payment from the defendant of produce to be estimated in the way therein prescribed. On appeal to this Court, the decree was modified as to the determination of the relative proportional rights of the parties, and payment was ordered of mesne profits computed according to the principles thus laid down. This adjudication took place in 1878. It appears to have been used by the parties as a standard for the division of profits for some time afterwards, but as to the years 1882-84 a dispute arose, and the plaintiff sought to enforce his right under the decree by execution proceeding against the defendant. The Subordinate Judge has adjudged in favour of the plaintiff as judgment-creditor, but it does not seem possible to uphold his judgment. The award of mesne profits, however to be computed, is something quite different from an award of a periodical payment *in æternum*. The very word "mesne" implies a terminus *ad quem* as well as *à quo*, and the terminus in the absence of a special order is the date of the decree. It is not possible to extract from the decree a command to pay any sum in or for 1882-84. The plaintiff could not, therefore, proceed by way of execution. His remedy was by a suit on the right established by the decree of this Court.

We reverse the decree in execution of the Subordinate Judge. Each party is to bear his own costs of these proceedings throughout. Moneys recovered under the order of the Subordinate Judge must be refunded.

Order reversed.

APPELLATE CIVIL.

Before Mr Justice West and Mr Justice Birdwood.

DESA I MA'LA BHA'I BA'PUBHA'I, (ORIGINAL DEFENDANT), APPELLANT, *v* KESHAVBHA'I KUBERBHA'I, (ORIGINAL PLAINTIFF), OPPONENT.* 1887 *July* 20.

Mámlatdárs' Courts Act (Bombay Act III of 1876), Sec 4, Cl II—Jurisdiction to grant an injunction—Possession—Physical possession—Disturbance of possession.

Under section 4, clause II of the Mámlatdárs' Act (Bombay Act III of 1876) (1) a Mámlatdár can grant an injunction in those cases only in which an interruption of *physical* possession or enjoyment is sought to be removed

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882) The village of Sachánáwas originally granted in *inám* to the common ancestor of the parties concerned in the present application The lands in the village were in the occupation of tenants who paid the *vaze* and the *vero* (the annual rent and cesses), partly in cash and partly in kind The revenues of the village thus obtained were distributed among the descendants of the original grantee according to their respective shares, one moiety was enjoyed by the petitioner Málábhái and his branch of the family, a fourth share belonged to the opponent Keshavbhái, and the remainder to one Báldev.

* Application under Extraordinary Jurisdiction, No 83 of 1886.

(1) Section 4, clauses I and II, of Bombay Act III of 1876 provides as follows —

(1) Every Mámlatdár shall preside over a Court, which shall be called a Mámlatdárs' Court, and which shall have power within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals or water-courses to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy, or other right of any other person in respect thereof.

(2) The said Court shall also have power within the said limits when any person is disturbed or obstructed, or when an attempt has been made to disturb or obstruct any person, in the possession of any lands, premises, crops, trees, or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields, to issue an injunction to the person causing, or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any such further disturbance or obstruction

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Báldev died in 1881, leaving behind him two childless widows, Bái Diváli and Bái Parsan.

In 1883, Keshavbhái filed a suit against Bái Diváli for a declaration of his right to receive and enjoy the deceased Báldev's share of the revenues of the village to the exclusion of his widows, who, he alleged, were only entitled to maintenance. In this suit Málábhái sought to intervene, but was successfully resisted by Keshavbhái. The suit was eventually compromised, and a consent-decree was passed, declaring Keshavbhái's exclusive right to manage and enjoy the deceased Báldev's share.

Keshavbhái, however, did not appear to have enforced his rights under the decree. He did not enter into possession, either actual or constructive, of Báldev's share The tenants did not attorn to him or even to Bái Diváli. They were served with notices by Málábhái forbidding them to pay any rent to Keshavbhái, or to Báldev's widows.

Thereupon Keshavbhái filed a suit in the Mámlatdár's Court at Viramgám, praying for an injunction restraining Málábhái and others from interfering with his management and enjoyment of the deceased Báldev's share. The Mámlatdár granted the injunction prayed for. He ordered Malabhái and others not to obstruct Keshavbhái in receiving the profits of the deceased Báldev's share, and not to disturb his management and enjoyment thereof.

Aginst this order Málábhhái applied to the High Court, under section 622 of the Code of Civil Procedure (XIV of 1882), on the ground that the Mámlatdár had no jurisdiction to grant the injunction prayed for.

A rule *nisi* was granted by West and Nánábhái, JJ., on the 6th May, 1886, calling upon Keshavbhái to show cause why the Mámlatdár's order should not be set aside as illegal and *ultra vires*.

Macpherson, Acting Advocate General (with him Ráv Sáheb *Vásudev Jagannáth*), showed cause:—The Mámlatdár finds that Keshavbhái has been in possession down to this day. He has passed a *kabuláyat* to Government for the village. The actual occupation of the soil is in the rayats, but the co-sharers receive

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their respective shares of the produce through a common manager. His possession is the possession of all. The consent-decree establishes Keshavbhái's exclusive right to receive Báldev's share of the profits. Málábhái interfered with our right by issuing notices to the tenants forbidding them to pay us any rent. The Mámlatdár has jurisdiction to remove such interference.

Jardine (with him *Gokuldás Kahándás Párekh*) *contra* :—The consent-decree gives Keshavbhái only a right to recover the profits falling to Báldev's share. It does not put him in possession. All that he acquires is a right to sue. There was neither attornment nor payment of rent by the tenants to Keshavbhái. We have not ousted him from physical possession. We have given the tenants a notice, claiming rent for ourselves. That does not entitle the plaintiff to sue for an injunction in the Mámlatdár's Court. Under clause 2, section 4 of Bombay Act III of 1876, a Mámlatdár has no power to grant an injunction in a case like this, where no disturbance is caused or attempted to be caused to physical possession.

WEST, J. :—The plaintiff Keshavbhái had not, so far as the evidence shows, possession of land within the meaning of section 4, clause 2, of the Mámlatdárs' Act in such wise that he could claim an injunction from the Mámlatdár. When this clause is compared with the first of the same section, we may gather, from the omission from it of the words "profits of the same" (that is of lands), that only an interruption of physical possession or enjoyment was intended to be removed by the injunction for which the clause provides. Such possession the plaintiff Keshavbhái had not acquired; nor, so far as the evidence shows, is it clear that he had ever acquired a complete constructive possession through an attornment of tenants, who having previously paid rent to Diváli and so created a *de facto* possession as of a landlord in her would thus complete a transfer from her to Keshavbhái.

We, therefore, make the rule absolute, and reverse the Mámlatdár's order. Costs of these proceedings to be borne by the opponent.

Rule made absolute.

APPELLATE CIVIL.

Before Mr Justice West and Mr. Justice Birdwood.

1887. *July 27.*

HORMASJI MOTA'BHAI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* PESTANJI DHANJIBHA'I, (ORIGINAL DEFENDANT), RESPONDENT *

Contract—Illegal contract—Contract entered into in violation of the law—Partnership—Illegal partnership—Right of partner to sue for a share—Contract Act (IX of 1872), Secs. 23, 24—A'bkári Act (Bombay Act V of 1878), Sec. 45—Breach of license—Penalty.

A contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto*.

A. and B. took a liquor contract from the Government. By the terms of their license they were forbidden to take a partner, and under section 45 of the Bombay A bkári Act (V of 1878) they were liable to a penalty of Rs. 100 for a breach of their license. C. entered into partnership with A. and B. with full knowledge of the conditions of the license, and afterwards filed a suit for an account of the partnership transactions.

Held, that C. was not entitled to any relief, having entered into the partnership in direct violation of the law.

APPEAL from the decision of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 3 of 1883.

This was a suit for an account and for the winding up of a dissolved partnership. It was alleged in the plaint that the defendants 3 and 4 had taken up a liquor farm from the Collector of Surat for the year 1881-82, and had subsequently admitted the plaintiff and the other parties to the suit as partners in the business. The plaintiff demanded an account, but was refused. He claimed Rs. 5,025 as his share of the profits of the business.

The defendants pleaded *(inter alia)* that according to the terms of the license granted by the Collector they were forbidden to sublet the farm or admit any partner in the business, that under the A'bkári Act (Bombay Act V of 1878) they were liable to a penalty of Rs. 100 for doing any act in contravention of the terms of the license, that the partnership entered into with the plaintiff was illegal, and that, therefore, the suit would not lie.

* Appeal, No. 115 of 1884.

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The Subordinate Judge found that the partnership-agreement was opposed to the terms of the license issued by the Government, and, therefore, held that it was illegal and void under section 23 of the Indian Contract Act (IX of 1872). The suit was accordingly dismissed with costs.

Against this decision the plaintiff appealed to the High Court.

Jardine (with him *Máneksháh Jehángirshái*) for the appellant:—The plaintiff's admission as a partner in the business was, no doubt, a breach of the license. That would justify a cancellation of the license, but would not affect the plaintiff's claim for a share in the profits. The defendants, who have taken our money, must render an account, or else return the money—*Joseph* v. *Solano*(1).

Káshináth Trimbak Telang (with him *Shántárám Nárayan*) for the respondents:—The partnership-agreement, being directly opposed to the terms of the license, is illegal. Sections 32 and 45 of the Bombay A'bkári Act (V of 1878) cover a case like this. The Act imposes a penalty for a breach of the license. The plaintiff, who was himself a licensee, was fully aware of the terms of the license. He entered into the agreement with full knowledge of its illegality. The agreement is, therefore, void—Lindley on Partnership, Bk. I, Ch. v, sec. 2, p. 104 (5th ed.); *Sykes* v. *Beadon*(2).

WEST, J.:—In this case the plaintiff sued the defendants for an account of partnership transactions. The defence is that the partnership having been entered into in violation of the law, no obligation was constituted by it. The defendants Nos. 3 and 4 took a liquor contract from the Government, and, by the terms of their license, were forbidden to take a partner. By taking the plaintiff as a partner they consequently became liable to a penalty of Rs. 100 under section 45 of the A'bkári Act (Bombay Act V of 1878). The plaintiff has himself been a licensee, and must be familiar with the terms embodied in the usual form, which was made use of in the present case. In entering into partnership with the defendants, therefore, he was consciously taking part in a breach of the law prohibited by a penalty. The

(1) 9 Beng. L. R., 441. (2) L. R., 11 Ch. Div., 170.

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case of *Sykes* v. *Beadon*[1], referred to in argument, shows that a contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto*. The Indian Contract Act, secs. 23, 24, involves the same principle, which may be indeed gathered also from the judgment of Sir R. Couch in *Joseph* v. *Solano*[2] relied on for the appellant. See, too, *Cannan* v. *Bryce*[3]; Story on Bailments, sec. 158 (7th ed.); Story on Partnership, sec. 6 (5th ed.)

The case of *Gordon* v. *Howden*[4] is identical in principle with the one before us, and in that case the House of Lords refused to give effect to a secret partnership for pawnbroking contrary to the terms of the Statute 39 and 40, Geo. III, cap. 99.

We, therefore, confirm the decree of the Subordinate Judge. Each party is to bear his own costs throughout.

Decree confirmed.

(1) L. R., 11 Ch. Div., 170.
(2) 9 Beng. L. R., 441.
(3) 3 B. & Al., 179.
(4) 12 Cl. and Finnelly, 237.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887 *August* 11.

DA'DA'PA', (ORIGINAL APPLICANT), APPELLANT, *v.* VISHNUDA'S AND OTHERS, (ORIGINAL OPPONENTS), RESPONDENTS.*

Insolvency—Insolvent debtor—Unfair preference—Civil Procedure Code (Act XIV of 1882), Sec. 351.

A creditor can put pressure on his debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances. But a debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently, and no title is given to that particular creditor as against the assignees who represent the creditors generally.

A. filed a suit and obtained a decree against B. During the pendency of the suit, and only four days before the decree was passed, B. assigned by way of mortgage nearly the whole of his property to one of his creditors C. The assignment was made, not to secure a fresh advance, but in consideration of past debts

* Appeal from Order, No. 2 of 1887.

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due to C. C. was aware of B.'s embarrassments. Two years afterwards B. was arrested in execution of A.'s decree. B. thereupon applied to be declared an insolvent.

Held, that the assignment by B. of nearly the whole of his property to C. amounted, under the circumstances, to an unfair preference, within the meaning of section 351, clause (*c*) of the Code of Civil Procedure (XIV of 1882). B. was, therefore, not entitled to be declared an insolvent.

APPEAL from the order of Ráv Sáheb Vyankatráo R. Inámdár, Second Class Subordinate Judge of Bijápur, in miscellaneous application No. 7 of 1886.

The appellant Dádápá was arrested in execution of a decree obtained by one Vishnudás on the 30th May, 1884. Thereupon Dádápá applied to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure (XIV of 1882).

This application was rejected by the Subordinate Judge. He found that in 1879 Dádápá had mortgaged certain property to one Gokuldás for Rs. 800; that when Vishnudás sued Dádápá in 1884, Gokuldás began to press Dádápá for payment of his money; that during the pendency of the suit, and only four days before the decree was passed in favour of Vishnudás, Dádápá transferred nearly the whole of his property to Gokuldás under a mortgage-bond for Rs. 600; and that the consideration for this bond was the balance due to Gokuldás on account of former transactions.

The Subordinate Judge was of opinion that the mortgage by Dádápá of nearly the whole of his property for Rs. 600 amounted, under the circumstances, to an unfair preference within the meaning of section 351, clause (*c*) of the Code of Civil Procedure (XIV of 1882), and as such disentitled him to be declared an insolvent.

Against this decision Dádápá appealed to the High Court.

Shámráv Vithal for the appellant:—On the facts found by the Subordinate Judge the appellant is entitled to be declared an insolvent. There were debts due to Gokuldás. He was pressing hard for payment. The mortgage was effected under this pressure. There is no proof of any intention to defraud the general body of creditors. The transaction, therefore, does not amount to an

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unfair preference—*Joakim* v. *The Secretary of State for India*[1]; *Ex parte Craven*[2].

There was no appearance for the respondents.

WEST, J.:—In this case the Subordinate Judge determined that the transaction on the part of the present appellant amounted to an unfair preference, and as such, disentitled him to the benefit of section 351 of the Code of Civil Procedure (XIV of 1882). The ground for his decision was that the bond for Rs. 600 passed to Gokuldás four days before the decree against the appellant of itself constituted an unfair preference, and was one which put Gokuldás in a more advantageous position as compared with the other creditors.

It is clear that his passing that mortgage-bond to Gokuldás, instead of letting the latter wait for the distribution of his assets under the insolvency rules, gave Gokuldás a preference; and, *primâ facie*, it was an unfair advantage given to him over the other creditors.

It has been argued at much length that there was no unfair or fraudulent preference shown; and Mr. Shamráv Vithal on behalf of the appellant has relied upon a decision in *Joakim* v. *The Secretary of State for India*. This decision appears to be opposed to several English rulings which bear directly upon the question in this case. The general doctrine is that a creditor can put pressure on a debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances; but it is also the general doctrine that a debtor who gives an unfair preference to one particular creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently, and no title is given to that particular creditor as against the assignees who represent the creditors generally—*Ex parte Halliday*; *In re Liebert*[3]; also *Marks* v. *Feldman*[4] and *Butcher* v. *Stead*[5]. In the last mentioned case Lord Hatherley says: "I think the Legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws, and in order to give a

(1) I. L. R., 3 All., 530.
(2) L. R., 10 Eq., 648.
(3) L. R., 8 Ch. App., p. 283.
(4) L. R., 5 Q. B., p. 275.
(5) 7 Eng. and Ir. App., p. 839 at p. 849.

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fraudulent preference, make this payment or this charge it shall be wholly done away with except in cases where the person you have so favoured is wholly ignorant of your intention to favour him and receives payment simply for valuable consideration and *bonâ fide*, that is, without any notice of any intention on your part fraudulently to favour one creditor above another." If there had been a new advance given by Gokuldás to the appellant, the conduct of the latter would not, perhaps, have been an act of bankruptcy. In the present case, however, the creditor was aware that the debtor was in embarrassed circumstances, and got an assignment of nearly the whole of his property only four days before a decree was passed against him There was, clearly, an unfair preference shown to Gokuldás by the debtor, although the latter did not apply to be declared an insolvent for nearly two years afterwards. As a matter of fact, he applied as soon as execution of the decree was sought in the very suit, during the pendency of which he passed the bond charging his property with Rs. 600. This transaction the lower Court held to be a fraudulent preference; and we would not be justified in interfering with the lower Court's decision, unless we were satisfied to the contrary. We must, therefore, confirm the order of the Subordinate Judge.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *August* 17.

HARI (ASSIGNEE OF DECREE-HOLDER), APPELLANT, *v.* NA'RA'YAN *alias* SAMBHOJI, A MINOR, BY HIS GUARDIAN CHIMA'BA'I, (JUDGMENT-DEBTOR), RESPONDENTS.*

Execution of decree—Limitation—Application for execution in accordance with law—Limitation Act, XV of 1877, Sch. II, Art. 179—Decree against a minor—Application for execution against minor's mother personally, but not as his guardian.

On the 31st July, 1879, a decree was passed against N., a minor, represented by his mother and guardian C. In December, 1880, the first application for execution was made. Through mistake execution was sought against C. herself, as 'widow of B.', and not as guardian of the minor N. That application was granted, and cer-

*Second Appeal, No. 117 of 1887.

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tain property belonging to the minor was attached. On the 29th November, 1883, the second application for execution was made against the minor as represented by his guardian C. The present application for execution was made on the 3rd December, 1884. This application was rejected as time-barred by the District Court in appeal, on the ground that the first application having been made against a wrong person, could not be taken into account; that, therefore, it could not keep the decree alive, and that the present application was barred.

Held, reversing the decision of the lower Court, that the decree-holder ought not to be deprived of the fruit of his decree on account of a technical defect in his application of 1880. The minor was substantially and for all practical purposes represented by his mother.

THIS was an appeal from the order of C. G. W. Macpherson, Acting District Judge of Sátára, in Appeal No. 279 of 1885.

On the 31st July, 1879, the plaintiff Vithobá bin Málápá obtained a decree against Náráyan Bábáji, a minor, represented by his mother and guardian, Chimábái.

On the 1st December, 1880, Vithobá applied for execution of the decree against Chimábái herself, describing her as "widow and heir of Bábáji, deceased," and not as guardian of the minor Náráyan. The Court issued a notice to Chimábái, but she did not appear to contest the application. The Court accordingly ordered execution to issue.

On the 29th November, 1883, the decree-holder presented a second *darkhást* for execution. On this occasion he did not omit to put the minor on the record. Nothing, however, was done on this application.

On the 3rd December, 1884, the present application for execution was made by Hari bin Irápá, to whom the decree had been assigned.

The application was resisted, on the ground that it was time-barred. It was contended, on the minor's behalf, that as the decree-holder had ignored him, and proceeded against a wrong party under his first *darkhást*, that application should be treated as a nullity, and, therefore, was of no effect in keeping the decree alive.

The Court of first instance held, on the authority of the rulings in *Syud Mahomed* v. *Syud Abedoollah*[1] and *Fuzloor Ruhman* v.

(1) 12 Calc. L. R., 279.

Altaf Hassen(1), that though the first application for execution was defective and informal, it could not be treated as a nullity, and that, therefore, it was sufficient to keep the decree alive. The Court accordingly ordered execution to issue.

On appeal, the District Judge was of opinion that the first *darkhást* was not an application for execution "in accordance with law," as the minor had been ignored, and execution sought against a wrong person.

He, therefore, rejected the present *darkhást* as time-barred.

Against this decision a second appeal was preferred to the High Court.

Telang (with him *Mánekshák Jehángirshák* and *Dáji Ábáji Khare*) for the appellant:—The first *darkhást* was not correctly worded. There was a mistake in the description of the widow. But that was a mere irregularity. The minor was effectively represented by his mother and guardian. She represented her son as well as the estate fully and for all practical purposes. The proceedings taken against her are binding on the minor—*Ishan Chunder Mitter* v. *Buksh Ali Soudagur*(2); *The General Manager of the Ráj Durbhunga under the Court of Wards* v *Mahárájáh Coomár Rámáput Sing*(3).

Macpherson (with him *Ganesh Rámchandra Kirloskar*) for the respondent:—Schedule II, article 179 of Act XV of 1877 requires an application for execution to be made "in accordance with law." The execution must be sought against the judgment-debtor alone. He must be put on the record. Otherwise proceedings taken against a third party will not bind him. In the present case the minor, against whom the decree was passed, was ignored. Execution was sought against his mother, not as his guardian, but in her own right. The first application for execution is, therefore, not "in accordance with law." It, therefore, does not save limitation—*Denonath Chuckerbutty* v. *Lallit Coomar Gangopadhya*(4); *Rámásámi* v. *Bágirathi*(5); *Akobá Dádá* v. *Sakhárám*(6).

(1) I. L. R., 10 Calc., 541.
(2) Mars., 614.
(3) 14 Moore's I. A., 605.
(4) I. L. R., 9 Calc., 633.
(5) I. L. R., 6 Mad., 180.
(6) I. L. R., 9 Bom., 429.

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WEST, J.:—The decree in this case having been obtained against the infant Náráyan, son of Bábáji, represented in the case by his mother Chimábái, the judgment-creditor in 1880 sought execution for the costs awarded to him by the decree. Through error, however, he sought that execution against Chimábái herself, instead of merely as guardian of her son. There was another application, in 1883, against Náráyan, but nothing was done on it. It would prevent the bar of limitation if the earlier application could be considered as a sufficient one for the purposes of Act XV of 1877, Sch. II, art. 179, but not otherwise The District Judge has thought that the earlier application was not to be taken into account at all, but, having regard to the case of *The General Manager of the Ráj Durbhunga under the Court of Wards* v. *Mahárájah Coomár Rámáput Sing*(1), we are of opinion that the mortgagor need not and ought not to be deprived of the fruit of his decree on account of the technical defect in his application of 1880. There was at that time no one to think or act for the infant Náráyan except his mother Chimábái. What was brought home to her consciousness was, for all practical purposes, brought home to the consciousness of her son, and the execution in 1880 was not resisted by her. It proceeded against the property held by her then, as now, really for her son.

We, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge in execution. Each party to bear his own costs throughout.

Decree reversed.

(1) 14 Moo. I. A., 605.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

NA'RA'YANRA'V DA'MODAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* JAVHERVAHU, (ORIGINAL DEFENDANT), RESPONDENT.*

1887. *September* 21, 22, 29.

Hindu law—Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs—Practice—Amendment of plaint.

The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father.

In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question.

Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of first instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court,

Held, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable.

Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion.

At the hearing of the appeal it was alleged that the plaintiffs had separated from their father before the mortgage decree was passed against him, and an application was made on their behalf that the plaint in this case should be amended by inserting an allegation to that effect.

Held, that the amendment could not be allowed. Such an amendment would entirely alter the points of contention between the parties. In suing in the form

* Appeal, No. 30 of 1885.

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adopted by the plaintiffs they doubtless intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property altogether from the liability, on the ground that the debt was immoral, and that the estate could not, therefore, be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, they could not now ask the Court to put their suit on a new footing.

THIS was an appeal from the decision of M. H. Scott, District Judge of Ahmednagar, in Suit No. 4 of 1884.

The defendant obtained a decree on a mortgage against the plaintiff's father for possession of certain property which the latter had mortgaged to him. The decree also awarded interest on the mortgage-debt and costs of the suit.

The defendant sought, in execution, to recover the cost by sale of the mortgaged property. The plaintiffs objected to the sale; but their objection was disallowed, and they thereupon filed the present suit, praying for a declaration that the property in dispute was not liable to attachment and sale in execution of the defendant's decree against their father, on the ground that the debts contracted by their father had been contracted for immoral purposes, and, therefore, were not binding on them as his sons. They also alleged that the property in suit had been granted as a *jághír* for the support of the family, and, as such, could not be alienated from the family.

The Court found that the father had not incurred any debts for immoral purposes, and that there were no incidents or conditions attaching to the estate to distinguish it from any other ancestral immovable property which was saleable for ancestral debts. The suit was, therefore, dismissed.

Against this decision the plaintiffs appealed to the High Court.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the appellant:—The decree directs payment of costs by the father personally. The costs are not thrown on the estate. The decree as to costs is, therefore, in the nature of a money decree against the father. In execution of such a decree the creditor has no right to proceed against the sons' share in the family property. The sons are not parties to the decree, and are, therefore, not bound by it—

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Bhikáji Rámchandra Oke v. *Yashvantráv*[1]; *Bábáji* v. *Dhuri*[2]; *Murárráv Anandráv* v. *Pándurang Hari*[3]. The property is a *jághir*, and, therefore, inalienable—*Nilmoni Singh Deo* v. *Bakranáth Singh*[4].

Mahádev Chimnáji Apte for the respondent:—Even under a money decree the creditor has a right to proceed against every kind of property over which the father has a power of disposal. The father can sell his ancestral property to pay off his own debts. And the sale is binding on the sons, unless they can impeach it on the ground of illegality or immorality. If, then, the father can sell, so can the creditor. It is not necessary to make the sons parties to the proceedings against the father. The father, as the head of the family, represents the family both in his dealings with the outside world and for purposes of litigation. A decree against the father is, therefore, binding on the sons, though they be not parties to the suit in which it is passed. And the decree-holder has a right to proceed against the entire family estate—*Jagabhái Lalubhái* v. *Vijbhukandás Jagjivandas*[5]; *Sukhárám Shet* v. *Sitárám Shet*[6]; *Narasánna* v. *Guráppa*[7]; and *Nanomi Babuasin* v. *Modhun Mohun*[8]. These cases show that a creditor can sell the whole family property in execution of a decree against the father. In the case of *Simbhunáth Pánde* v. *Goláp Singh*[9] the circumstances were peculiar. The mortgage which was executed by the father, the decree upon the mortgage, the proclamation of sale, and the sale certificate, —all purported to affect the father's interest alone. Under those circumstances the Privy Council held that what was put up to sale and what actually passed to the auction-purchaser was the right, title, and interest of the father alone. That ruling does not apply to the present case, where the whole family property is held in mortgage by the creditor, and he insists upon selling the whole in satisfaction of his debt.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* in reply:—In almost all the cases cited the question as to the son's liability arose after the

(1) I. L. R., 8 Bom., 489.
(2) I. L. R., 9 Bom., 305.
(3) Printed Judgments for 1855, p. 30.
(4) I. L. R., 9 Calc., 187.
(5) I. L. R., 11 Bom., 37.
(6) I. L. R., 11 Bom., 42.
(7) I. L. R., 9 Mad., 424.
(8) I. L. R., 13 Calc., 21.
(9) I. L. R., 14 Calc., 572.

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father's death A son takes a vested interest in ancestral estate at his birth That interest is, no doubt, subject to the liability of the estate for the debts of his father. But it is only when the father acts as the head and manager of the family that his transactions are binding on the sons. That is the case in a united family But where the father is separated from his sons, his acts cannot bind them. In the present case we allege that a partition had taken place between the father and the sons a year before the defendant obtained a decree against the father.

[WEST, J.—You did not rest your case on this ground in the lower Court.]

It is true there is no reference in the plaint to the partition, but the plaintiff's pleader in his statement (exhibit 18) distinctly asked that the two-third share of the property, which belonged to the sons, should be exempted from attachment and sale. I, therefore, ask to be allowed to amend the plaint so as to raise the question of separation.

Mahádev Chimnáji Apte:—There is no mention of separation in the plaint. The parties went to trial on the footing of *union* between the father and the sons The plaintiff has no right, at this stage, to set up a totally new case.

WEST, J.:—In this case the first point is, whether at this stage of the case it is proper to allow the appellants to make a change in the plaint of so material a nature as that asked for by them. Such an amendment would entirely alter the points of contention between the parties. It is not the practice to allow such a change after a cause has been disposed of, and we are not inclined to permit it in the present instance.

Those who have gone to issue on one aspect of the case cannot ask for a new decision on a different aspect of the case The only circumstance in which the Courts have departed from this rule is in the case of a merely formal point of amendment. The appellants here are not persons who have for the first time been engaged in litigation. In suing in the form they chose, they, doubtless, intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property

altogether from the liability, on the ground that the debt was immoral, and, therefore, that the estate could not be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, not only in their plaint, but in the statement of their pleaders, they cannot now come and ask the Court to have the suit put on a different footing.

We have, therefore, to consider what was the position of the plaintiffs with reference to the original suit The original suit was brought against the father on a mortgage for a limited time. The decree in that suit handed over the property to the mortgagee for a definite time, and awarded payment of interest and costs by the father. The payment of the interest and costs consequently became a debt upon the whole estate, from which it could not escape, unless it were clearly made out that the debt was the result of fraud or immorality. The possession given to the mortgagee was certainly valid, as the father was alive. The question of its validity, indeed, could not arise until the father's death, although the father alone was sued, and he alone was primarily liable for the fulfilment of the Court's decree; still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would also have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. This is the view held by the Privy Council in a recent decision.

The ruling in *Simbhunáth Pánde* v. *Golapsingh*(1) might suggest a contrary decision. There the Privy Council determined the father had a right to deal with his sons' shares in the family property, but that the terms of the transaction might show that it was not his intention to do so in that particular case. The question of the sons' assent was raised, and the Privy Council held that it would be bound by the assent, if the sons intended their own shares to be affected. In calling in the sons to assent to a dealing with the family property by the father, the intention to affect their shares would generally perhaps be presumed; but the creditor ought to take care to make sons parties to execution proceedings if he wishes to make them liable in cases where their assent is a material point in his case as against them.

(1) I. L. R., 14 Calc., 572.

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In the present case, the sons' interest as well as that of the father has been attached, and they are made parties to the execution proceedings. The present case differs from the one we have referred to. The sons come in during the pendency of the execution proceedings and make themselves parties to it. We are, therefore, left very much in the same position as if the case already cited had not been decided. If we go back to the case of *Nanomi Babuasin* v. *Modhun Mohun* (1) we are bound to consider that in an united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In the present case he entered into litigation, which resulted in loss to himself and to the family which he represented, and he can make the family responsible for any loss so incurred. The judgment-creditor can also make them liable.

The precise case which is before us now has not been dealt with heretofore, but the principles applicable to it have. In a recent appeal, *Jagabhái Lalubhái* v. *Vijbhukandás Jaggivandás* (2), we set forth the principles applicable to such cases, and we based our decision on the ruling in *Nanomi Babuasin* v. *Modhun Mohun* (3). The principles enunciated in the case decided by this Court, which has been already referred to, are correct so far as they go, but that decision is to be supplemented by the following principle; that is to say, that although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable when he explicitly or impliedly binds only his own portion.

The question as to the litigation having only affected the father's interests not having been raised and decided in favour of the present appellants in such a way as to liberate them from the responsibility of the decree against the father, we must confirm the decree of the lower Court with costs.

Decree confirmed.

(1) I. L. R., 13 Calc., 21. (2) I. L. R., 11 Bom., 37.

(3) I. L. R., 13 Calc., 21.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* BYRA'MJI EDALJI.*

1887. *December* 1.

Public nuisance—Penal Code (Act XLV of 1860), Secs. 268 and 290—Annoyance to a particular religious sect—Private nuisance.

The accused cut up, on his verandah, meat that was to be cooked for a dinner party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Jains complained to the Magistrate that the accused had made the air offensive, and caused annoyance. The Magistrate found that the meat was not in an offensive state, but convicted the accused of committing a public nuisance, under section 268 of the Indian Penal Code, on the ground that he had done an act by which several persons being Jains were much annoyed, it being a well-known fact that they had great repugnance to the killing of animals of every sort.

Held, reversing the conviction and sentence, that in this case no real damage or injury was caused to the public or to the people in general dwelling in the vicinity, and that it was a case of private rather than of public nuisance, and, therefore, not one falling within the purview of the criminal law. The applicant's act was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals, and did not constitute an offence under section 290 of the Indian Penal Code.

Muttumira v. *Queen-Empress* (1) referred to.

THIS was an application under section 435 of the Code of Criminal Procedure (Act X of 1882). The applicant had been convicted, under section 268 of the Indian Penal Code, of the offence of causing a public nuisance, on the complaint of Ráichand Sobhájí. The complainant was a Jain by religion, and he alleged that on the 5th July, 1887, the accused engaged four butchers to chop meat on the verandah of his house situated on a high road and close to a Jain temple. The complainant and several other persons, while going along the road to the temple, were much annoyed by the sight and smell of flesh exposed within a few yards of the sacred place. They remonstrated with the accused, but without effect. The complainant thereupon charged him with causing a public nuisance under section 268 of the Indian Penal Code.

*Application for Revision, No. 223 of 1887.

(1) I. L. R., 7 Mad., 590.

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The accused pleaded not guilty. He stated that it was a great holiday, and that he had invited guests to a dinner-party, in preparation for which he had meat cut up on the verandah of his house early in the morning, not knowing that he would thereby cause or was likely to cause any annoyance to the public.

The First Class Magistrate, who tried the case summarily, under the provisions of Chapter XXII of the Code of Criminal Procedure (Act X of 1882), convicted the accused of committing a public nuisance under section 268 of the Indian Penal Code, and sentenced him to pay a fine of Rs. 2. He recorded the following reasons for the conviction:—

"It is in evidence that several persons, being Jains, were much annoyed at what was done by the accused, it being a well-known fact that they have great repugnance to the killing of animals of every sort. They have a right to use the way to their temple, as well as the temple itself, without let or hindrance. On the other hand, the accused has a right to use his *otlá*, or platform, as he likes, but he certainly has no right to expose a heap of meat on a high way in the way he did. The complainant and his witnesses aver that the bad smell about the spot made it necessary for them to apply a cloth to their nose; but the municipal inspector, who went there presently afterwards, did not notice the smell, owing probably to the place having been cleaned after the removal of the meat. I hold, therefore, that the accused did cause annoyance in regard to the exercise of the public right on the part of a portion of the community, and convict him accordingly."

Against this conviction the accused applied to the High Court under its Criminal Revisional Jurisdiction.

Mánekshák Jehángirshák for the applicant.

Ganpat Sadáshiv Ráv for the opponent.

Per Curiam:—In this case, the applicant has been found guilty of committing public nuisance, as defined in section 268 of the Indian Penal Code, and has been punished under section 290.

On the occasion of his giving a dinner-party, he cut up the meat that was to be cooked for the dinner in the verandah *(otlá)* of

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his house, and so exposed it to the sight of persons passing along the road, among whom were some Jains, whose temple is near the house. They complained to the Magistrate that by this act the applicant "had made the air offensive, and created an annoying sight." The Magistrate has not found that the meat was in an offensive state, but he has convicted the applicant of committing a public nuisance, on the ground that he had done an act by which several persons, being Jains, were much annoyed, it being a well-known fact, that they (the Jains) have great repugnance to the killing of animals of every sort.

Now it has been held that, in order to constitute a nuisance, there must be "not merely a nominal, but such a sensible and real damage as a sensible person, * * * would find injurious"—*Scott* v. *Firth*[1]. In the present case, no real damage or injury is alleged to have been caused to the public or to the people in general dwelling in the vicinity, but merely an annoyance to those Jains alone who happened to pass along the road in front of the applicant's house at the time when the meat was being cut up or exposed there. If that was so, it was a case of private rather than of public nuisance, and, therefore, not one falling within the purview of the criminal law—*The King* v. *Lloyd*[2]. The annoyance, moreover, such as it was, neither did nor could cause any sensible or real damage. It was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals. It was thus of the nature of a sentimental grievance, which could be felt only by persons holding certain views as to the killing of animals.

In the case of *Muttumira* v. *Queen-Empress* [3] it was held that section 268 of the Penal Code was not intended to apply to acts and omissions calculated to offend the sentiments of a class, and that the placing of a Mahomedan symbol in the neighbourhood of a Hindu temple is not a public nuisance, though likely to cause serious annoyance to the Hindu public. In the present case, we are also of opinion that the act of the applicant does

(1) 4 F. & F., 349. (2) 4 Esp., 199.
(3) I. L. R., 7 Mad., 590.

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not constitute an offence punishable under section 290 of the Indian Penal Code We reverse the conviction and sentence, and direct that the fine be returned.

Conviction and sentence reversed

APPELLATE CRIMINAL.

Before Mr Bayley (Acting Chief Justice), Mr. Justice Birdwood, and Mr. Justice Parsons

1888
February 2

QUEEN-EMPRESS v. GANU SONBA' AND ANOTHER *

Evidence Act (I of 1872), Sec. 132—Protection given to answers which a witness is compelled to give—"Compelled to give"—Meaning of the words—Indian Oaths' Act (X of 1873), Sec. 14

Section 132 of the Evidence Act (I of 1872) makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give.

The Queen v *Gopál Dos*(1) followed.

Per BIRDWOOD, J., (dissenting).—Section 132 of the Evidence Act (I of 1872) read with section 14 of the Indian Oaths' Act (X of 1873), compels a witness to answer criminating questions, and he is protected by the proviso to section 132 from a criminal prosecution for any offence of which he criminates himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question, and his request is refused, that he is "compelled to give" the answer within the meaning of the proviso The compulsion is operative whether he asks to be excused or gives the answer without so asking.

APPEALS against the convictions and sentences recorded by Shripat B. Thákur, Acting Sessions Judge at Ratnágiri, in the case of *Queen-Empress* v. *Sarasvatibái and Others*.

The facts of this case, so far as they are material for this report, are as follows:—

One Sábáji Báji obtained a decree against Kesu Rám Laka for possession of three *thikáns*, and in execution obtained possession of one of the *thikáns* on the 27th June, 1887. Thereupon Kesu's sister, Sarasvatibái, applied under section 332 of the Code of Civil Procedure (Act XIV of 1882), alleging that the *thikán* in question

* Criminal Appeals, Nos 174 and 180 of 887

(1) I. L. R., 3 Mad., 271.

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belonged to her, that she had purchased it from her father Rám Bhagván under a sale-deed dated 2nd November, 1875, that she had since been in possession, and that she had been illegally dispossessed in execution of Sábáji's decree.

The Subordinate Judge made an enquiry into the matter. In the course of the inquiry the accused Ganu Sonbá and Bhikáji Hari were examined as witnesses for Sarasvatibái. They deposed that the sale-deed of the 2nd November, 1875, had been executed by Rám Bhagván in their presence, and that they had both attested it. The Subordinate Judge, however, disbelieved this evidence, found the sale-deed to be a fabrication, and committed Sarasvatibái and her accomplices—Kesu Ganu, Bhikáji and Tukiá—to the Court of Session to take their trial, the first two on a charge of forgery and the others for abetment of forgery.

All the accused were tried together. They pleaded not guilty. The Acting Sessions Judge found the sale-deed in question to be a forgery, and convicted Sarasvatibái and Kesu under sections 467 and 471 of the Indian Penal Code. As regards the accused Ganu and Bhikáji, he admitted in evidence their depositions recorded by the Subordinate Judge in the summary inquiry, and solely on the strength of these depositions convicted both of abetment of forgery under sections 109 and 467 of the Indian Penal Code, and sentenced them each to one year's rigorous imprisonment.

Against this conviction and sentence both Ganu and Bhikáji appealed to the High Court.

There was no appearance either for the accused or for the Crown.

BIRDWOOD, J.:—The conviction of the appellants rests upon the depositions made by them in an execution proceeding, in which they admitted their attestations of the deed of sale, which is proved by the evidence in the present case to be a forgery. In their examinations in the present case they deny their attestations; and if their depositions in the former case are excluded from consideration, there is nothing to show that

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they attested the deed of sale. The Sessions Judge, relying on the decision of the majority of the Judges who composed the Full Bench in the case of *The Queen* v. *Gopál Doss* (1), decided by the Madras High Court on the 4th February, 1881, has admitted the depositions. I concur, however, in the opinion of the two Judges (Kernan and Muttusámi Ayyar, JJ.,) who dissented from that decision. I think that section 132 of the Evidence Act, read with section 14 of Act X of 1873, compels a witness to answer criminating questions, and that he is protected by the proviso to section 132 from a criminal prosecution for any offence of which he criminates himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from answering a criminating question, and his request is refused, that he is, in my opinion, "compelled to give" the answer, within the meaning of the proviso. The compulsion is operative whether he asks to be excused or gives the answer without so asking. I would, therefore, acquit the appellants. But as Mr. Justice Parsons does not concur in this opinion, the case must be laid before another Judge under section 429 of the Code of Criminal Procedure (Act X of 1882).

PARSONS, J.:—I agree with the opinion expressed by the majority of the Judges in the case of *The Queen* v. *Gopál Doss*(1), and would admit the evidence. Reading section 132 of the Evidence Act as a whole I can come to no other conclusion than that the Legislature has by it made a clear distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and has given him a protection in the latter of those cases only. If protection was to be allowed in every case in which a witness gives an answer, the words "be compelled to" in the proviso are quite superfluous. The insertion of those words clearly shows, to my mind, that protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give: (see Field's Law of Evidence, p. 646, 4th ed.). In the

(1) I. L. R., 3 Mad., 271.

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present case both the accused were examined in the Court of the Subordinate Judge on behalf of Sarasvati and Kesu, and they freely and voluntarily there gave evidence to the effect that they had attested the deed on which Sarasvati and Kesu relied. This deed was held to be a forgery. Sarasvati and Kesu were prosecuted and convicted of the forgery; and the accused were tried along with them and convicted on a charge of abetment of that forgery, and their answers in the Court of the Subordinate Judge were admitted in evidence against them. I am of opinion that these answers being purely voluntary answers, and not answers which they were in any way compelled to give, can be proved against them in the present trial. And as they are proved, I would dismiss these appeals.

The case was accordingly referred to the Acting Chief Justice Mr. Bayley, who gave the following judgment:—

"For the reasons given by Sir Charles Turner, C. J., in the case of *The Queen* v. *Gopál Dass* (1) I think that the evidence is admissible, and I concur with Mr. Justice Parsons in dismissing the appeals."

Appeals dismissed.

(1) I. L. R., 3 Mad., 271.

APPELLATE CIVIL

Before Mr. Justice Nánábhái Haridás, Mr. Justice Birdwood, and Mr. Justice Jardine.

1888.

February 6.

DA'MODAR JAGANNA'TH, PLAINTIFF, *v.* ATMA'RA'M BA'BA'JI, DEFENDANT.*

Stamp Act I of 1879, *Sec.* 34, *Prov. 1—Suit on an unstamped promissory note—Evidence Act I of* 1872, *Secs.* 65, *Cl. (b), and* 91.

The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the

* Civil Reference, No. 41 of 1887.

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DÁMODAR JAGANNÁTH v. ATMÁRÁM BÁBÁJI.

stamp duty and the penalty, under section 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court,

Held, *per* JARDINE, J., that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp.

Held, *per* BIRDWOOD, J., that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under section 65, cl. (*b*) of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected.

THIS was a reference by Ráv Sáheb V. V. Wágle, Subordinate Judge of Chiplún, under section 49 of the Stamp Act I of 1879. The reference was as follows:—

"The plaintiff in this case sued to recover Rs. 15 as balance due on a note passed by the defendant on the 22nd December, 1886, for Rs. 38 borrowed by him on that date. The defendant admitted having passed the note sued on, but alleged that he received only Rs. 37 worth of paddy from the plaintiff, and that this amount was paid off. He also objected to the admissibility of the note, the same being unstamped. The plaintiff then applied to the Court to receive the note in evidence on payment of the necessary stamp duty and penalty, under section 34 of the Stamp Act, I of 1879. The defendant's *vakil* opposed this application, relying on Proviso I to the said section, and contended that the note being a promissory note was not liable to be admitted in evidence on payment of the duty and penalty. The plaintiff's *vakil*, on the other hand, argued that the document was not a promissory note, but either a bond or an ordinary agreement, and that in any case the defendant having admitted receipt of the consideration, so far as the amount claimed is concerned, he, the

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plaintiff, was entitled to a decree, unless the defendant proved his alleged satisfaction."

The following is a translation of the document sued on:—

"Private memorandum.—To Dámodar Jagannáth Thate, by Atmárám Set bin Bábáji Set Potkar, inhabitant of Parashrám. (I) have received from you Rs 38. Interest therefor is agreed to be at the rate of one *per cent. (per mensem)*. The time (for the repayment) thereof is (as follows):—After a month and a half (I will pay) a moiety (of the amount), and after (another) month and a half, the other moiety: thus, after three months from this day I will pay (the amount) in full. This is duly given in writing. Lunar date *Margashirsh, Vadya* 12th, the day of the week Wednesday, in *Shake* 1808 (22nd December 1886), in the *Samvatsar* (cyclical year) named *Vijaya*. Hand writing my own. (Signature)."

The Subordinate Judge referred the following questions to the High Court for decision:—

(1) Whether the document sued on (exhibit 3) was a promissory note, a bond, or an agreement?

(2) Whether the admission made by the defendant of the consideration of the document would entitle the plaintiff to maintain his suit notwithstanding the inadmissibility of the document?

The Subordinate Judge's opinion on the first point was that the document was a promissory note, and on the second in the affirmative.

There was no appearance for the parties.

JARDINE, J.:—I am of opinion that the document sued on is a promissory note.

The plaint shows that the suit is brought on the promissory note as the original cause of action. The admission of the contents of this document made by the defendant in his written statement does not avail the plaintiff, the document being itself inadmissible in evidence from want of stamp—*Ankur Chunder Roy* v. *Madhub Chunder Ghose*[1]. My reasons for this opinion are those stated in *Sheikh Akbár* v. *Sheikh Khán*[2], which case

(1) 21 Calc. W. R. Civ. Rul., 1.

(2) I. L. R., 7 Calc., 256.

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as well as that of *Radhakant Sháha* v. *Abhoychurn Mitter*[1] the present case resembles,—the facts of *Golap Chand* v. *Thákuráni Mohokoom Kooaree*[2] and *Hirálal* v. *Datádin*[3] coming under a different principle.

BIRDWOOD, J.:—The Subordinate Judge has adopted an unusual course in mixing up a reference under section 49 of the Stamp Act with one under section 617 of the Code of Civil Procedure. A reference under the former Act must be disposed of by three Judges of this Court, whereas one under the Code can be dealt with by one of the Division Benches ordinarily sitting. However, as the two references now made arise out of the same case, it will not be inconvenient to dispose of them together.

On the question referred under the Stamp Act, I concur with Mr. Justice Jardine that the document sued on is a promissory note. It is chargeable with a duty of two annas.

On the question referred under section 617 of the Code, I am of opinion that the plaintiff cannot, in this case, recover irrespectively of the promissory note, because he does not seek to prove the consideration otherwise than by the note, which is inadmissible in evidence, and because the admissions contained in the written statement do not amount to an admission of the claim as for money lent.

The case is not one in which secondary evidence would be admissible for the purpose of proving the contents of the unstamped promissory note; for primary evidence, *i. e.*, the document itself, is forthcoming. To such a case, section 65, clause (*b*) of the Evidence Act would not apply. The admission of secondary evidence would, moreover, be an evasion of section 34 of the Stamp Act of 1879, under which the note cannot "be acted on," being unstamped. See *Muttukaruppa Kaundan* v. *Rámá Pillai*[4]. To prove it by secondary evidence, and so make it the basis of a decree, would clearly be to act on it. The note cannot, therefore, be looked at in dealing with the claim.

The document itself and secondary evidence of its contents being inadmissible, no other evidence can, under section 91 of

(1) I. L. R., 8 Calc., 721.
(2) I. L. R., 3 Calc., 314
(3) I. L. R., 4 All., 135.
(4) 3 Mad. H. C. Rep., 158, 160.

the Evidence Act, be given to prove the terms of the contract between the parties, of which the note was intended to be the evidence—*Ankur Chunder Roy* v. *Madhub Chunder Ghose*[1]. If the plaintiff had sought to prove the consideration by other evidence, as for instance, by evidence as to an admission of the debt by the defendant, such evidence would have been admissible. But he rests his claim on the note; and that being inadmissible, he must fall back and recover, if at all, on admissions, if any, in the written statement.

In *Farr* v. *Price*[2], the verdict for the plaintiff was set aside on the ground that the promissory note sued on bore a nine-penny instead of an eight-penny stamp, as required by the Statute, 37 Geo. III, c. 90; but Lord Kenyon, C. J., observed that "as there were other general counts in the declaration, if the plaintiff could give other evidence of consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it;" and in *Tyte* v. *Jones*, quoted in the note to that case, Lord Kenyon "permitted the plaintiff," who had obtained an unstamped promissory note from the defendant, "to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt."

In *Golap Chand* v. *Thákuráni Mohokoom Kooáree*[3], the case of *Farr* v. *Price*[2] is cited as an authority for the rule that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration if the pleadings are properly framed for that purpose; and the Judges who decided *Golap Chand's case*[3] remark further that, in this country, the great power given of raising the true issues between the parties prevents the question of pleading having much importance; and they held that Lord Kenyon's decision in *Farr* v. *Price*[2] precisely governed the case, in which the plaintiff, who sued on an unstamped promissory note, sought to give evidence of the advance, the form of pleading being, as the Judges said, not material. In the present case, it is not necessary to

21 Calc. W. R. Civ. Rul., 1. (2) 1 East., 55 at p. 59. (3) I. L. R., 3 Calc., 314.

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decide whether the plaintiff may be allowed to give independent evidence of the advance,—evidence, that is, apart from the defendant's admissions in the written statement;—for what the plaintiff relies on, as I understand from the terms of the reference, after the rejection of the promissory note, are the admissions in the written statement only. So that the case is similar to that of *Ankur Chunder* v. *Madhub*[1], rather than to that of *Golap Chand* v. *Thákuráni Mohokoom Kooáree*[2]. And the only question is whether the written statement of the defendant amounts to such an admission of the claim as to dispense with the production of the promissory note in evidence. If it does not, and if the production of the note itself is necessary, the suit must fail. In *Ankur Chunder's case*[3], the plaintiff did not set out the document sued on in the plaint, nor did the defendant admit it in such a way as to make it unnecessary for the plaintiff to produce it; and Couch, C. J., observed: "It seems to me that, when the plaintiff made it a part of his case that he should produce and prove the document, it cannot be said that his case was so admitted by the defendant that he need not produce it." In that case, the defendant admitted that he wrote the '*amanati rokha*' filed by the plaintiff, but denied that he had received the money covered by it. The plaintiff's appeal was accordingly dismissed.

This decision seems to govern the present case. And I think the Subordinate Judge ought to reject the claim, as the plaintiff does not offer any independent evidence of the advance alleged by him, and the defendant does not in his written statement admit that any money was lent to him, as alleged by the plaintiff, but sets up an entirely different transaction, in respect of which he admits no remaining liability.

NÁNÁBHÁI HARIDÁS, J.:—I concur.

(1) 21 Calc. W. R. Civ. Rul., 1. (2) I. L. R., 3 Calc., 314.

(3) 21 Calc. W. R. Civ. Rul., at p. 2.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

RAGHUNA'TH GANESH, (ORIGINAL DEFENDANT), APPELLANT, *v.* MULNA AMAD, RESPONDENT.*

1888. *February* 13.

Decree—Execution - Civil Procedure Code (Act XIV of 1882*), Sec.* 244*—Construction—Acts VIII of* 1859*, Sec.* 387 *; XXIII of* 1861*, Sec.* 11.

The father of the defendant in 1853 obtained a decree against the father of the plaintiff and other persons for partition of village lands.

The decree directed that in effecting the partition certain *dhára* lands then occupied by the plaintiff's father were not to be included. Application for execution of that decree was made in 1861, but the execution proceedings remained pending until 1882. On the 12th December, 1882, the decree was executed, and the defendant (his father being then dead) was put into possession of the lands now in dispute as being part of the lands to which he was entitled under the decree. The plaintiff objected that those lands were not subject to partition under the decree, and he applied for an order that they should be delivered back to him. His application was rejected, and he thereupon brought the present suit to recover the lands from the defendant. The Court of first instance was of opinion that the question raised in the suit related to the execution of the decree made in 1853, and under section 244 of the Civil Procedure Code Act XIV of 1882 could not be raised again by a separate suit. The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree. On appeal by the defendant to the High Court,

Held, reversing the decree of the lower Appellate Court, that the plaintiff's suit should be dismissed. The question whether the *dhára* lands received by the defendant in execution of the decree of 1853, were included in that decree, was a question relating to the execution of the decree within the meaning of section 244 of the Civil Procedure Code Act XIV of 1882, which barred a separate suit.

THIS was a second appeal from a decision of G. McCorkell, Assistant Judge of Ratnágiri.

The plaintiff was a *mulna* and the defendant a *khot* of the village of Dabhil, in the Ratnágiri District. Both were entitled to certain shares in the village land. In 1851 the father of the defendant sued the father of the plaintiff and others for partition of the village, and in 1853 obtained, on appeal, a decree in terms of an agreement made between him and the other parties to the suit. One of the terms of the agreement provided that the *dhára* lands of the Mulnas were not to be

* Second Appeal, No. 713 of 1885.

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included in the partition, and the decree recited that "the plaintiff recognizes the right of the Mulnas; accordingly, whatever *dhára* lands may be with them, will remain in their occupation."

In 1861 the defendant's father applied for execution of this decree, but the matter remained pending till 1882. On the 12th December, 1882, (the defendant's father being then dead), possession of the lands now in dispute was given to the defendant as being part of the land to which his father was entitled under the decree. The plaintiff objected that these lands were not included in the decree, and he applied for an order that they should be delivered back to him. His application was rejected on the 31st March, 1883.

The plaintiff then brought this suit to recover the land from the defendant.

The Court of first instance was of opinion that the question between the parties was a question relating to the execution of the decree made in 1853, and as such could not, under section 244 of the Civil Procedure Code (XIV of 1882), be determined by a separate suit. The plaintiff's suit was, therefore, dismissed.

The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree with the following remarks:—

"The Subordinate Judge thinks that these execution proceedings are bound by Act VIII of 1859 as amended by Act XXIII of 1861, and that, therefore, the plaintiff's action is barred by section 244 of Act XIV of 1882. Under the Acts which were in force in 1853, I do not consider that the present plaintiffs' suit would have been barred, and, therefore, the latter portion of section 387, Act VIII of 1859, saves the plaintiff's right to institute the present suit. Again, I cannot accept that the language of the decree left any question of *dhára* lands to be determined at the time of execution. It speaks of the *dhára* land of the Mulnas as something clearly and definitely determined * * * *. The difficulty has arisen solely from the delay in the execution proceedings."

The defendant preferred a second appeal to the High Court.

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Dáji Ábáji Kharé for the appellant:—This is a question in execution of a decree, and as such cannot be raised in a separate suit. The Court executing the decree must decide it—section 244 of the Civil Procedure Codes of 1877 and 1882; *Muttuvelu Pillai* v. *Vythilinga Pillai*[1]; *Jagendro Núráin Koonwár* v. *Ránee Surno Moyee*[2].

Shántárám Náráyan for the respondent:—If the proceedings in this suit are to be governed by the old Code Act VIII of 1859 a separate suit will lie under section 387 of that Code. The proceedings in execution of the decree of 1853 had commenced before Act XXIII of 1861 came into force, and Act XIV of 1870 repealed section 387 of Act VIII of 1859. Section 6 of the General Clauses Act I of 1868 saves the proceedings from being affected by the repealing Acts. The right of the plaintiff to bring a suit arose in 1882 only. It was a vested right, and could not be affected by section 11 of Act XXIII of 1861 and section 244 of Act X of 1877. An appeal is included in the words "proceedings commenced" used in section 6 of the General Clauses Act I of 1868—*Hurrosundari Dabi* v. *Bhojo Haridás*[3], and proceedings in execution ought also to be included. In *Chinto Joshi* v. *Krishnáji*[4] execution proceedings commenced under the former Code were held to be governed by that Code. Section 244 of Act XIV of 1882 applies only to proceedings begun after it came into force.

In this case the *darkhást* of 1861 was a pending proceeding when Act X of 1877 came into force, and the case cannot be governed by that Act. See section 3 of the Code.

Dáji Ábáji Kharé in reply:—The present suit having been brought in 1883 after the Code of 1882 had come into force, it must be governed by the provisions of that Code. The rule in section 6 of the General Clauses Act applies only to proceedings "commenced": see *Gurupadápá* v. *Virbhádrápá Irsangapa*[5]. A separate suit is a new proceeding, and there is no connexion

(1) 5 Mad. H. C. Rep., 185.
(2) 14 Calc. W. R. Civ. Rul., 39.
(3) I. L. R., 13 Calc., 86.
(4) I. L. R., 3 Bom., 214.
(5) I. L. R., 7 Bom., 459.

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between it and execution proceedings: see *Chinto Joshi* v. *Krishnáji*[1]. Section 3 of Act XIV of 1882 applies to procedure prior to decree, and does not bar the application of section 244. It saves only proceedings commenced and pending—*In the matter of the petition of Ratansi Kalianji*[2]. But a suit cannot be regarded as part of a pending proceeding. The plaint in a suit initiates a new proceeding, and a suit is subject to the law in force at the date of its institution.

JARDINE, J.:—The question whether the *dhára* lands received by defendant in execution of the decree were included in the decree, is a question relating to execution—*Muttuvelu Pillai* v. *Vythilinga Pillai* [3] and *Jogendro Náráin Koonwár* v. *Rámee Surno Moyee*[4]—under section 11 of Act XXIII of 1861, which section, if it stood alone, would bar a separate suit.

The saving provision of section 387 of Act VIII of 1859 was repealed by Act XIV of 1870. It deals with procedure only.

Section 3 of Act X of 1877 only saves "procedure *prior to decree*", and leaves procedure after decree to the uncontrolled operation of the bar reproduced in section 244.

Assuming that the "proceedings" in execution of the decree of 1853 had commenced before the 28th August, 1861, when Act XXIII of 1861 came into force, these "proceedings" would not be affected by the repeal in 1870. See section 6 of the General Clauses Act I of 1868.

But where is the authority for treating the fresh suit as a part of any such proceedings? None has been shown us.

That an appeal is to be regarded as a stage in a suit or judicial proceeding leading up to final disposal is settled by the decisions in *Ratanchand Shrichand* v. *Hanmantráo Shivbakas* [5]; *Thákur Prasád* v. *Ahsan Ali*[6]; *Runjit Singh* v. *Meherbán Koer* [7]. But a plaint is the mode of initiating what in the Acts of 1859, 1861, 1877, and 1882 is called a "separate suit," and the analogy

(1) I. L. R., 3 Bom., 214.
(2) I. L. R., 2 Bom., 148 at p. 165.
(3) 5 Mad. H. C. Rep., 185.
(4) 14 Calc. W. R. Civ. Rul., 39.
(5) 6 Bom. H. C. Rep., 166, A. C. J.
(6) I. L. R., 1 All., 668.
(7) I. L. R., 3 Calc., 602

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of an appeal is inapplicable in the face of such language. There is no intrinsic unity between the execution proceedings and the separate suit. See *Chinto Joshi* v. *Krishnáji Nárayan*(1). The rule in section 6 of the General Clauses Act does not govern the remotest consequences, but only such a series of proceedings as group themselves naturally together—*Gurupadápá Basápá* v. *Virbhadrápá Irsangápá*(2).

The time at which, as alleged by plaintiff, he was entitled to bring the suit did not accrue till 1882. So section 11 of Act XXIII of 1861 and section 244 of Act X of 1877 did not bar any vested right—*Papa Sastrial* v. *Anuntarámá Sastrial*(3); *Kimbray* v. *Draper*(4).

The definite language of the Acts about procedure, namely, Act VIII of 1859, sec. 283, Act XXIII of 1861, sec. 11, and the two later Codes, sec. 244, appears to us to overrule the wide construction of section 6 of the General Clauses Act propounded by Mr. Shántárám. Two of these enactments are later than the General Clauses Act, which applies only to "proceedings commenced". There is nothing in these words to indicate an intention to confer a right to bring future suits of a sort which two earlier Acts had already barred. We think, therefore, we should follow the special enactments as regards "proceedings".

If the sections above quoted be regarded as mere procedure, the special enactments apply—*Wright* v. *Hale*(5); *Kimbray* v. *Draper*(6). Section 887 of Act VIII of 1859 applies in terms to procedure only, and it has not been contended that under the earlier law the fresh suit was contemplated as a part of the older proceeding in execution.

We think the view we have expressed is supported by the opinions of the Judges *In the matter of the petition of Ratansi Kalidnji*(7), and is consistent with the language of Act XIV of 1870. By treating a separate suit as a new proceeding, we con-

(1) I. L. R., 3 Bom., 214.
(2) I. L. R., 7 Bom., 459 at p. 463.
(3) I. L. R., 3 Mad., 98.
(4) 3 Q. B., 160.
(5) 30 L. J., Ex., 40.
(6) 3 Q. B., 160.
(7) I. L. R., 2 Bom., 148 at pp. 182, 203 and 218.

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strue the Codes as having prospective effect. With reference to some of the decisions quoted, we think this view of the matter will not work injustice. As pointed out by Mr. Kharé, the law allowed similar and suitable remedy while barring separate suit.

We, therefore, reverse the decree of the Assistant Judge, and restore that made by the Subordinate Judge dismissing the suit. Costs on the plaintiff throughout.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

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FÁTMÁBAI, (PLAINTIFF), *v.* AISHÁBÁI, (DEFENDANT) *

Res judicata—Suit by a woman for a share of property alleging herself to be A.'s widow—Prayer for declaration of her marriage to A.—Denial of her marriage to A by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (XIV of 1882), Sec. 13—Practice—Preliminary issue—Right to begin—Two counsel heard in argument of preliminary issue

The plaintiff Fátmábái in this suit alleged that both she and the defendant had been the wives of one Háji Adam Háji Ismáil, a Cutchi Memon Mohmedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambái Both plaintiff and defendant had since Háji Adam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishábái had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fátmábái and her daughter Mariambái filed a suit (No. 227 of 1882) against the present defendant Aishábái, claiming a share of the estate of her deceased husband Háji Adam In that suit she alleged that she had been lawfully married to Háji Adam, and had ever since cohabited with him, and that her child Mariambái was his legitimate daughter; and she prayed *(inter alia)* for a declaration that she was the lawful wife and that Mariambái was the lawful daughter of Háji Adam In the written statement filed by Aishábái in that suit she alleged that Fátmábái was not the lawful wife of Háji Adam, but only his kept mistress, and she denied that Fátmábái was entitled to share in his property.

* Suit No. 500 of 1887

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On the 3rd May, 1882, an order of reference was made, by which both the above suits, *viz.* No. 616 of 1879 and No. 227 of 1882, "and all matter in difference thereon" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in Suit No. 227 of 1882, Fátmábái was to be paid by Aishábái a sum of Rs. 55,000 in full satisfaction of all the claims of Fátmábái and her daughter Mariambái upon the estate of Háji Adam, the rest of the estate being declared the sole property of Aishábái. The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award * * * and doth order that the said Aishábái do pay for the said Fátmábái to her attorneys, Messrs. Tyabji and Dayabhái, within seven days after the date of this decree, the sum of Rs. 55,000 *in full settlement of all and singular the claims and claim of the said Fátmábái and Mariambái or either of them against or upon the estate of the said Háji Adam Háji Ismáil whatsoever and wheresoever* * * *and doth declare* that upon the payment of the said sum of Rs. 55,000 by the said Aishábái to the said Fátmábái as aforesaid, *all claims whatsoever* of the said Fátmábái and Mariambái or either of them upon the estate of the said Háji Adam Háji Ismail, in the hands of any person whatsoever or upon the said Aishábái as heir of the said Háji Adam Háji Ismáil *personally or otherwise howsoever, shall be considered to have been fully satisfied* by the said *Aishábái and absolutely waived for ever by the said Fátmábái and Mariambái*; and doth further declare *that the said Aishábái is entitled absolutely* to all the rest of the estate and effects of the said Háji Adam Háji Ismáil as her sole property as against the said Fátmábái and Mariambái."

The defendant Aishabái in 1882 also filed another suit (No. 108 of 1882) against her father-in-law's executors, and recovered certain ornaments which she alleged to be her *stridhan*.

In October, 1886, Aishábái married again; and in December, 1887, Fátmábái filed the present suit against her, alleging that by the law and custom of Cutchi Memons Aishábái had by reason of such second marriage forfeited all rights and interests to and in the property of her first husband Háji Adam, and also to the ornaments which she had recovered in the last mentioned suit, and she claimed that the said property and ornaments now belonged to her (Fátmábái) as sole surviving widow of the said Háji Adam. She prayed for a declaration that Aishábái had by her second marriage forfeited her right to the said property and ornaments, and that she (the plaintiff) was now entitled thereto; that the defendant might be ordered to deliver, &c., &c.

The defendant Aishábái filed a written statement in which *(inter alia)* she contended that the plaintiff was never the wife of Háji Adam, but had been merely his kept mistress; that in Suit No. 227 of 1882 she (the defendant) had denied that the plaintiff Fátmábái was the widow of Háji Adam; that the award and decree in that suit were not made upon the basis of her (Fátmábái's) being such widow, and she (the defendant) submitted that the said award and decree were a bar to the present suit. It was contended for the defendant (1) that the plaintiff had in the former suit prayed for a declaration that she had

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been the lawful wife of Háji Adam; that the decree in that suit contained no such declaration, and that her prayer must, therefore, be taken to have been refused under section 13 of the Civil Procedure Code (XIV of 1882), and that she was consequently not now entitled to sue as his widow—her claim to be his widow being *res judicata*; (2) that the decree in Suit No. 227 of 1882 expressly declared that the Rs. 55,000 awarded to plaintiff by that decree was in full settlement of all her claim; and that she was, therefore, precluded from claiming against the estate in any possible contingency; and that, therefore, the defendant's remarriage gave her no right to sue; (3) that the latter part of the decree amounted to a release and assignment by the plaintiff Fátmábái to the defendant of all her (the plaintiff's) right to the property in question.

Held (1) that the *status* of the plaintiff as widow of Háji Adam was not *res judicata*. The question of the plaintiff's marriage with Háji Adam had not been controverted before the arbitrators and finally decided in a manner sufficient to establish *res judicata*. An award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators; Explanation III of section 13 of the Civil Procedure Code (Act XIV of 1882) does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted.

(2) That the declaration in the former decree, that the Rs. 55,000 was paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The previous suit was brought by Fátmábái as widow against Aishábái *as widow*. The present suit was brought by Fátmábái as widow against Aishábái remarried. The ground relied upon in the present suit was a new ground not known and not in existence at the time of the former suit, *viz.*, that Aishábái was no longer a widow, and had, therefore, lost all legal right to the estate of her late husband. There was not the necessary condition to establish an estoppel, *viz.*, *eadem causa petendi* and *eadem conditio personarum*.

(3) But that the award and release contained in the decree constituted a binding agreement, by which the plaintiff Fátmábái for the sum of Rs. 55,000 waived all her rights against Aishábái, including the claim made in the present suit, which existed at the time of the award as a present right dependant on a contingency, and the suit, therefore, should be dismissed.

At the hearing of a case on a preliminary issue the defendant, by whom the issue is raised, has the right to begin.

Two counsel for the same party may be heard in argument of a preliminary issue.

THE plaintiff in this suit alleged that both she and the defendant had been the wives of one Háji Adam Háji Ismáil, a Cutchi Momon Mahomedan, who died intestate in Bombay in April, 1878, leaving these his widows and other members of his family

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him surviving. The plaintiff Fátmábái had a daughter named Mariambái.

In 1879 the defendant Aishábái filed a suit (No. 616 of 1879) against the executors of the will of Háji Ismáil Háji Habib, who was the father of her husband Háji Adam, claiming certain money which stood to her husband's credit in the books of the said Háji Ismáil; and on the 10th April, 1882, a decretal order was made in her favour as the widow of the said Háji Adam; and the suit was referred to the Commissioner, in order that certain inquiries might be made.

In June, 1882, the present plaintiff Fátmábái and her daughter Mariambái filed a suit (No. 227 of 1882) against the present defendant Aishábai, claiming *(inter alia)* to recover a share of the estate of her deceased husband Háji Adam. In that suit she alleged that she had been lawfully married to him about sixteen years previously, and had ever since cohabited with him, and that her child Mariambái was his legitimate daughter, and had always been acknowledged as such by him. The first prayer of the plaint in that suit was that it might be declared that she was the lawful wife, and that Mariambái was the lawful daughter, of the said Háji Adam Háji Ismáil.

In the written statement filed by Aishábái in that suit she alleged that Fátmábái was not the lawful wife of Háji Adam, but only his kept mistress, and she denied that Fátmábái was entitled to share in his property.

On the 3rd May, 1882, an order of reference was made, by which both the above mentioned suits, *viz.*, Suit No. 616 of 1879 and Suit No. 227 of 1882, "and all matters in difference therein" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were made on the 11th September, 1883; and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in Suit No. 227 of 1882 Fátmábái was to be paid by Aishábái a sum of Rs. 55,000 in full satisfaction of all the claims of Fátmábái and her daughter Mariambái upon the estate of the said Háji Adam Háji Ismáil, the rest of the said estate being declared the sole property of Aishábái.

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The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award . . . and doth order that the said Aishábái do pay for the said Fátmábai to her attorneys, Messrs. Tyabji and Dayábhai, within seven days after the date of this decree, the sum of Rs. 55,000 *in full settlement of all and singular the claims and claim of the said Fátmábái and Mariambái or either of them against or upon the estate of the said Háji Adam Háji Ismáil whatsoever and wheresoever* . . . and doth declare that upon the payment of the said sum of Rs. 55,000 by the said Aishábái to the said Fátmábái as aforesaid, *all claims whatsoever* of the said Fátmábái and Mariambái or either of them upon the estate of the said Háji Adam Háji Ismáil, in the hands of any person whatsoever or upon the said Aishábái as heir of the said Háji Adam Háji Ismáil *personally or otherwise howsoever, shall be considered to have been fully satisfied by the said Aishábái and absolutely waived for ever by the said Fátmábái and Mariambái;* and doth further declare *that the said Aishábái is entitled absolutely to all the rest of the estate and effects of the said Háji Adam Háji Ismáil as her sole property as against the said Fátmábái and Mariambái.*"

The defendant Aishábái in 1882 also filed another suit (No. 198 of 1882) against the executors of her father-in-law, Háji Ismáil Háji Habib, in which she claimed certain ornaments as her *stridhan*. She obtained a decree and recovered the ornaments.

In October, 1886, the defendant Aishábái married again. Her second husband was one Háji Ján Mahomed Háji Jusub.

On the 10th December, 1887, the plaintiff Fátmábái filed the present suit against Aishábái, alleging that, by the law and custom of the Cutchi Memons, Aishábái by reason of such remarriage had forfeited all rights and interest to and in the property of her first husband, the said Háji Adam Háji Ismáil, and also to the ornaments which she had recovered by the last mentioned suit; and she claimed that the said property and ornaments now belonged to her (Fátmábái) as sole surviving widow of the said Háji Adam Háji Ismáil. She prayed for a declaration that Aishábái had by her remarriage forfeited all right to the said property and ornaments, and that she (the plaintiff) was

now entitled thereto; that the defendant might be ordered to deliver, &c., &c.

The defendant Aishábái filed a written statement, in which *(inter alia)* she contended that the plaintiff was never the wife of Háji Adam Háji Ismáil, but had been merely his kept mistress; that in Suit No. 227 of 1882 she, (the defendant), had denied that the plaintiff Fátmábái was the widow of the said Háji Adam; that the award and decree in that suit were not made upon the basis of her (Fátmábái) being such widow; and she (the defendant) submitted that the said award and decree were a bar to the present suit.

By an order in chamber, Scott, J., directed that the following preliminary issue should be tried, *viz.*, whether the plaintiff is not precluded from bringing this suit, or obtaining the relief prayed, by reason of the proceedings in Suit No. 227 of 1882 and the award and decree therein.

Lang, Jardine, and *Telang* for the plaintiff.

Latham (Advocate General), *Farran,* and *Inverarity* for the defendant.

Latham:—A preliminary issue is really a demurrer; so we have a right to begin.

[SCOTT, J.:—Yes, I think so.]

Latham:—The question is, whether by the decree in Suit No. 227 of 1882 the plaintiff Fátmábái is not barred from making any further claim against the estate of Háji Adam Háji Ismail. In Suit No. 227 of 1882 she contended that she was his widow, and her daughter his legitimate child, and that as one of his two widows she was entitled to share in his estate. In that suit the defendant Aishábái claimed to be the sole widow. By the decree in that suit, Fátmábái got Rs. 55,000, and Aishábái took the rest of the estate. Fátmábái now contends that by Aishábái's remarriage she has forfeited her right to the estate, and that she (Fátmábái) as sole widow takes it. Fátmábái now claims as widow. But she did so also in the former suit, and she prayed for a declaration that she had been Háji Adam's lawful wife. The decree, however, does not grant that prayer. It must, therefore, be held to have

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been refused—section 13 of the Civil Procedure Code (Act XIV of 1882), Expl. III. That point is then *res judicata*. A decree on an award has the same effect as any other decree—*Wazeer Mahton* v. *Chuni Singh*,(1); *Dunn* v. *Murray* (2), *Smith* v. *Johnson*(3); *Katrick Chandra Pal* v. *Sridhar Mandal*(4).

But even if the decree, instead of refusing her the declaration she prayed for, had expressly granted it, Fátmábái's present claim would be equally barred. For the decree provides that the payment of Rs. 55,000 is in full settlement of all her claims. That clause precludes her from making any claim against the estate in any possible contingency. She is excluded not merely as against Aishábái. If Aishábái were dead, Fátmábái is by this clause barred from making any claim against the estate, which would then go to Háji Adam's heir. Aishábái's remarriage therefore, gives Fátmábái no right. Under the decree all her claims, as widow, are gone, but now she claims again as widow. The decree gives the rest of the estate to Aishábái absolutely. As to the effect of this, see *Rám Nárain Sing* v. *Pearay Bhugut* (5); *Bolye Chund Dutt* v. *Khetterpaul Byack*(6).

Again, by the decree all claims against Aishábái *personally* are given up. It is clear, then, that the waiver given by Fátmábái was not limited to claims against Aishábái as widow of Háji Adam, *i. e.* so long as she remained his widow. The fact, therefore, that she has now ceased to be a widow, is of no consequence. Fátmábái is equally barred. We submit that the effect of the decree is (1) that Fátmábái is precluded, not merely from making a claim to the estate as against Aishábái, but that she can make no claim against it as against any one; (2) that Aishábái takes the estate absolutely; and that it is not forfeitable in her hands. She is free to do with it as she pleases.

Lang, contra :—This suit is not barred by the decree in Suit No. 227 of 1882. That suit was by Fátmábái as widow against Aishábái as widow. It has been argued that because Fátmábái's prayer in that suit for a declaration that she was the lawful

(1) I. L. R., 7 Calc., 727
(2) 9 B. & Cr., 780.
(3) 15 East, 213.
(4) I. L. R., 12 Calc., 563.
( ) I. L. R., 9 Calc., 830
(6) 11 Beng. L. R., 469.

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wife of Háji Adam was not expressly granted by the award and decree, it must be taken to have been refused. That is not so. I submit that her rights as widow were by the decree expressly recognised. The award of Rs. 55,000 to her was made to her as widow, and was equivalent to a declaration that she was the lawful wife of Háji Adam. For it was only as his lawful wife that she had any claims at all upon the estate. As concubine she had none, and certainly the arbitrators would not have awarded her Rs. 55,000 as such. So that the award and decree affirm her position as widow. Then, as to the second point, we submit that the decree passed on the award must be treated as a release, and, as such, its effect is limited only to claims which were in the contemplation of the parties at the time it was made. As to the effect of general words in a release, *Directors, &c., of London and South Western Railway Company* v. *Blackmore*(1). It is clear that Aishábái's remarriage was not then in contemplation or considered at all. The suit was brought against her as widow. The only rights in dispute were the rights of plaintiff and defendant as widows. A suit against a person as heir to another is no bar to a subsequent suit against him in another capacity.

[SCOTT, J.:—The question is, did the award and decree in the prior suit deal only with the then existing relations of the parties, or was it intended to deal with all the relations that might possibly arise between them?]

Yes, and we say it dealt only with the then existing relations. The case of *Rám Núráin Sing* v. *Pearay Bhugut*(2) was as to a widow's interest in immoveable property under the Hindu law, and the point was, what words were sufficient to give her an absolute interest. In this case we say the words of the decree gave Aishábái an absolute interest so long as she was a widow, but on her remarriage her interest ceased. He cited *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*(3).

Telang on the same side:—Even if the arbitrators had decided that Fátmábái was not the lawful wife of Háji Adam, tha

(1) L. R., 4 Eng. and Ir. Ap., 610 at p. 623.

(2) I. L. R., 9 Calc., 830.

(3) 6 Moo. I. A., 1.

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decision would not have been *res judicata*, as that point is not mentioned in the decree—*Devarakonda Narasamma* v. *Devarakonda Kándyá*[1]; *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari*[2].

Latham in reply:—The decree cannot be merely regarded as a release; but even as a release it is sufficient to bar this suit. As to the case of *Sreemutty Rabutty Dossee* v. *Sibchundor Mullick*[3], see *Bolye Chund Dutt* v. *Khetterpaul Bysack*[4]. As to second marriage of Hindu widows and its effect, see Mayne's Hindu Law, para. 472, and Act XV of 1856. The award and decree were intended to settle all claims that could be made against Aishábái either as a widow or personally. This is a claim against her personally. Can it be argued that, if Aishábái had died, Fátmábái might have made a claim for the property? If not, how can she claim on Aishábái's remarriage?

6th March. SCOTT, J.:—In this suit Fátmábái, as widow of one Háji Adam Háji Ismáil, sued Aishábái, also widow of Háji Adam, and claimed a share of the sum which Aishábái had received as such widow, on the ground that she (Aishábái) has forfeited her share by remarriage. Aishábái has replied, amongst other things, that Fátmábái in a previous suit against her put forward a claim, as widow, to money of the late husband in Aishábái's hands, and that the Court in that previous case decided that Fátmábái was not lawfully married to Háji Adam. Aishábái has further replied in the present suit that in the previous suit a sum of money had been awarded to Fátmábái in final settlement of all claims she might have against Aishábái. Aishábai, therefore, now pleads that the question in dispute in the present suit was finally adjudicated in a previous suit between the same parties, and cannot, therefore, be entertained by the Court a second time. She relies, of course, upon section 13 of the Civil Procedure Code.

That section, as far as it concerns the present case, runs as follows:—"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and

(1) I. L. R., 4 Mad., 134.
(2) L. R., 5 Ind. Ap., 149.
(3) 6 Moo. I. A., 1.
(4) 11 Beng. L. R., 459, at p. 472.

substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. *Explanation I.*—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other. *Explanation II.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. *Explanation III.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused." This section only reproduces in a codified form the law of estoppel by record which is set out at length in the *The Duchess of Kingston's case* and the notes thereon in Smith's Leading Cases, Vol. II, p. 812, at p. 830 (9th ed.).

The conditions for the exclusion of jurisdiction on the ground of *res judicata* are most succinctly stated in the Roman law cited by Knight Bruce, V. C., in *Barrs* v. *Jackson*[1]. There must be the concurrence of *idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum;* and Pothier (Traité des Obligations, para. 894,) says: "De la chose jugée. Pour qu'il y a lieu a l'exception, il ne suffit pas que la chose que vous me demandiez soit la meme que vous m'aviez demandée il faut que vous la demandiez pour la meme cause pour laquelle vous l' aviez demandée. Oportet ut sit eadem causa petendi.....la meme chose peut m'etre due en vertu de plusieurs differentes causes d'obligations:" and again in para. 896 he says: "Quelque generale qu'ait été ma première demande en revendication d'une chose le jugement qui en a donné congé ne m'exclut pas de former de nouveau une demande en revendication lorsque je pretends en être devenu propriétaire par un titre survenu depuis le jugement. Car ce jugement en jugeant que je n'étais pas alors propriétaire de cette chose n'établit pas

(1) 1 Y. & C. C. C., 585 on App., 1 Phil., 582.

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que je n'ai pu en acquerir depuis la propriété." This commentary applies literally to the second ground relied upon by Aishábái, *viz.*, that all claims were settled by the previous decision. That suit was brought by Fátmábái as widow against Aishábái as widow. The present suit is brought by Fátmábái as widow against Aishábái remarried. The ground relied upon is a new ground, not known, not in existence, at the time of the former suit—to wit, that Aishábái is no longer a widow, and has, therefore, lost all legal right to the estate of the late husband. There is not the *eadem causa petendi*. There is not the *eadem conditio personarum*; see also *Hunter* v. *Stewart*[1]. I am of opinion, therefore, that, so far as her second ground goes, Aishábái has no claim to an estoppel.

The first ground remains for consideration. If Fátmábái was held by the Court in the previous case not to be a widow, she is certainly precluded from coming here for relief a second time as such widow. The former suit was referred to arbitration; an award was made; that award became in due course a consent decree. There is, therefore, no question as to its not being a judgment of a competent Court. The suit and all matters in difference between the parties were referred to the arbitrators. The prayer of the plaint was that she (Fátmábái) should be declared a lawful wife, and that her share as wife should be found and paid. The written statement denied Fátmábái's marriage. A number of affidavits were filed, with a view to a rule which stood over to the hearing. Those affidavits by consent were allowed to be used as evidence by the arbitrators. I have read them—not, of course, with any intention of reviewing the decision, but with a view of ascertaining what that decision included. The affidavits contain no proof sufficient to establish conclusively that Fátmábai was not married. Thus Aishábái herself only says: "I shall be able to prove at the hearing that Fátmábái was an orphan, brought to India as a slave girl, and was never recognised as a lawful wife." Fátmábái, on the other hand, in her affidavit, says she can prove both marriage and recognition by the family. The arbitrators only held one meeting.

[1] 31 L. J. Ch., 346.

They raised no issues. They called no witnesses. They gave their award without stating their reasons. They did not, in terms, refer to the question of marriage, but they awarded to Fátmábái, in full settlement of all her claims whatsoever upon Aishábái as heir, the sum of Rs. 55,000 out of the estate of the deceased husband, in the hands of Aishábái, and they said that Aishábái was entitled to the rest. The consent decree adopted the terms of the award. Thus, on a suit brought by a widow for a share in the estate of her husband, a substantial share was awarded. The inference is irresistible, that the arbitrators, although they were silent on the question of marriage, did not decide it in a sense adverse to the claimant. But, as regards the marriage itself, the question cannot have been controverted, and finally decided in a manner sufficient to establish *res judicata*. The arbitrators had not materials before them sufficient for the purpose. (See, as to the binding force of awards as estoppels, *Newall* v. *Elliot*[1].) I need not cite authorities for the proposition that an award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators. (See Bigelow on Estoppel, p. 64.)

But it was argued by the Advocate General with his accustomed skill, that as a declaration was prayed that Fátmábái was lawfully married, and that as such a declaration was not given in express terms, Explanation III of section 13 of the Civil Procedure Code applies, and, therefore, as the relief claimed was not granted, it must be taken as having been refused. I think that sub-section refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted or refused; otherwise the principle that an estoppel must be certain (see Comyn's Digest "Estoppel") would be violated. Here the main relief claimed was the payment of money improperly detained from Fátmábái as widow, and the declaration asked was not an independent head of relief, but was a subordinate claim dependant on the money claim. The money claim is the substance of the suit, and the decree for money is an implied

(1) 1 H. & C., 797; 32 L. J. Ex., 120.

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admission of her *status* as wife, if that *status* was decided at all. I am of opinion, therefore, the arbitrators were not silent in the sense required to justify the application of Explanation III of section 13.

His Lordship subsequently requested that the question as to the effect of the decree regarded as a release might be argued before him. The case came on again on the 12th March, 1888, for further argument on this point.

Latham (Advocate General) for the defendant:—The submission and award together constitute a contract—Russell on Awards, p. 8. That contract has now become part of the record. The words in the latter part of the decree import a release no doubt, but also much more. They really contain a family arrangement carried out by release and assignment—*Stapilton* v. *Stapilton*[1]. First, regarding the decree as a release, how shall we ascertain the intention. Usually the intention of a release is ascertained from the recitals. Here the pleadings in the suits are really the recitals, and from them we discover the intention of the parties. From them we find the plaintiff claimed as widow; the defendant alleged that the plaintiff was only a concubine. That point went to arbitration. Then comes the release. It is clear the plaintiff's claim as widow was in contemplation when it was made, and she gives it up on payment of Rs. 55,000. Reliance may be placed on cases in which, after release given, further property has been recovered, as in *Turner* v. *Turner*[2]. There, however, the right to share was admitted, and the only question was as to the amount. But here the *status* of the plaintiff was questioned, and her right to share at all was denied, and she was bought out. Further, she bases her claim in her plaint on an alleged custom of her caste on the remarriage of widows. She must have known of that custom at the date of the release. She must also have known that Aishábái's marriage was possible, and that on such marriage she would by the custom she alleges be entitled to the property. These then were contingent rights possessed by her at the date of the release. All these she gave up by the release.

(1) 2 White and Tudor's L. C., p. 920, (6th ed.). (2) 14 Ch. Div., 820.

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But the decree contains not merely a release, but also a declaration, which amounts to an assignment by Fátmábái to Aishábái of all the rest of the estate.

[SCOTT, J.:—Would this assignment pass future interests?]

We say that the claim of Fátmábái on Aishábái's remarriage (if any) was not a future interest, but a present though contingent interest. It was a right similar to that which she might have claimed on Aishábái's death. Aishábái is declared to be entitled to the rest of the estate "absolutely". It has been suggested that this gives her no more than a widow's estate. That is not so. This is a legal document; words of conveyance are to be taken most strongly against the grantor—*Bolye Chund Dutt* v. *Khetterpaul Bysack*(1). In *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*(2) the widow was acting only for her deceased husband.

Lastly, we say this was a family arrangement, which was final. It is clear the transaction was regarded as a compromise of a doubtful right. The arbitrators do not come to an express finding as to whether Fátmábái was lawful wife or not, but give her a sum of money to induce her to relinquish her claim. The cases discussed in the notes to *Stapilton* v. *Stapilton*(3) apply here.

Inverarity proposed to address the Court.

Jardine objected to a second counsel being heard. The case is down for hearing. It is true it is on a preliminary issue, but that can make no difference. Two speeches by separate counsel for the defendant are not allowed at the hearing of a case. The points raised here are, no doubt, points of law, but if two counsel are heard for that reason, then in every case in which the issues raise points of law two counsel must be heard. There is nothing to distinguish a hearing on a preliminary issue from the ordinary hearing of a case.

Inverarity:—A preliminary issue is analogous to a demurrer. He cited Chitty's Archbold, p. 642.

Latham:—Mr. Lang and Mr. Telang were both heard in the former argument of this case.

(1) 11 Beng. L. R., 459. (2) 6 Moo. Ind. Ap., 1.
(3) 2 White and Tudor's L. C., p. 920, (6th ed.).

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SCOTT, J.:—I have consulted Bayley, J., and he agrees with me that two counsel ought to be allowed to address the Court.

Invcrarity :—This was clearly a family arrangement, and the release in the decree was a complete release to the estate. The fact that the attorneys of the parties were the arbitrators, is strong evidence to show that the settlement was intended to be final. The plaint in Suit No. 227 of 1882 stated that Aishábái had Rs. 1,50,000 of the estate in her hands If Fátmábái was the lawful widow, she was entitled to share in that She consented to take less than a half share, and to give up all claim against the estate.

Jardine, for the plaintiff, *contra* :—There is no evidence that this was a family arrangement. The document before the Court is simply a decree.

By the decree Rs. 55,000 is paid to Fátmábai, and a balance is left in Aishábái's hands. Fátmábái's claim in Suit No. 227 of 1882 was as a widow The decree was made in that suit, and she got the Rs. 55,000 in full settlement of the decree. The real point of dispute in that suit was whether Fátmábái was to be regarded as the widow of Háji Adam or not. The decree recognised her as such, and effected a partition of the estate between them as widows. The word "absolutely" merely meant that neither was to interfere with the other in the enjoyment of her share. Aishábái could not take more than a widow's interest—*Sreemutty Rabutty Dossee* v *Sibchunder Mullick*[1]. The decree is to be interpreted having regard to the circumstances in which it was passed and what was contemplated by the parties. The only point at issue was whether Fátmábái was entitled to a widow's share—*Lyall* v. *Edwards*[2]. The present claim is as to a new accretion—*Turner* v. *Turner*[3].

SCOTT, J —There is no doubt that a release though expressed in general terms may be restrained to what was the intention of the parties, but that intention must be found in the facts of each case. What, then, are the facts of this case? Háji Adam

(1) 6 Moo. Ind. Ap., 1. (2) 6 H. & N., 337; 30 L. J. Ex., 193
(3) 14 Ch. Div., 829.

dies, leaving considerable property. Aishábái, the present defendant, brings a suit, (No. 616 of 1879), to establish her right as his widow to that property, and obtains a decree for nearly two lákhs of rupees. Fátmábái, the plaintiff, brings a suit, No. 227 of 1882, as another widow of the deceased, for her share of what was awarded to Aishábái Aishábái denies in that suit that Fátmábái was either legally married, or acknowledged as a wife. Interrogatories are administered, and a number of affidavits filed on either side. Aishábái says she is able to prove that Fátmábái was an orphan slave girl, and never lawfully married; and relies on the description of herself as "wife" and of Fátmábái as "another woman Fátmábái, a Georgian slave of my son" in the will of her husband's father Fátmábái, on the other hand, says she is prepared to prove both her marriage and an acknowledgment of her as wife. The suit, obviously of a painful character to the family, instead of being fought out in Court is referred to the arbitration of Mr. Cumrudin Tyabji and Mr. Bháishankar, solicitors of the plaintiff and defendant respectively The arbitrators do not take fresh evidence, as the parties agree that "all the points in difference are contained in the affidavits," which are admitted as evidence. The whole proceedings are of a non-contentious character. The partners of the two arbitrators appear for the parties in the suit. There is only one meeting, no issues are settled, and finally the arbitrators give their award without reasons, allotting to Fátmábái Rs 55,000. The award is subsequently by agreement of the parties embodied in a consent decree. That decree recites, first, the prayer of the plaint—next, the reference ordering that the suit and all matters in difference should be referred to the arbitration of Messrs. Tyabji and Bháishankar—and then the Court proceeds to pass judgment, according to the award, in the following terms, which are the terms of the award, and contain the words I have now to construe, *viz.* "that the said Aishábái do pay to Fátmábái's attorneys the sum of Rs 55,000 in full settlement of all and singular the claims of Fátmábái in the estate of the deceased whatsoever and wheresoever", and the decree further declares that, upon the payment of the said sum, all claims whatsoever of Fátmábái upon the estate of the deceased in the hands

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of any person whatsoever or upon Aishábái as heir of the deceased personally, or otherwise, shall be considered to have been fully satisfied by Aishábái and absolutely waived for ever by Fátmábái —and it finally declares that Aishábái is entitled absolutely to all the rest of the estate and effects of the deceased as her sole property as against Fátmábái.

It is important to observe, first, that the award here set out goes much beyond the submission in the clauses declared to be abandoned, and yet it is adopted *ipissimis verbis* by the parties in the consent decree; and secondly, that the arbitrators, both lawyers, never touched the question of wife or no wife, whilst they gave Fátmábái much less than the moiety claimed. This decree was passed and the money paid in 1883.

The next incident in the history of the case is that Aishábái remarried in October, 1886. Fátmábái then filed her plaint in the present suit, praying that it might be declared, first, that Aishábái by her remarriage has forfeited all right and interest in the property of the deceased, and second, that Fátmábái being now sole widow of the deceased is entitled to all his property in the hands of Aishábái. The case then came on for hearing before me on the following preliminary issue, namely, "whether the plaintiff is not precluded from bringing this suit or obtaining the relief prayed by reason of the proceedings in Suit No. 227 of 1882, and the award and decree therein." I have already found that the defence of *res judicata* was not sustainable on that decree. But on the defence, that the award and decree constituted a valid and binding release, conveyance, or final settlement of all claims whatsoever Fátmábái might have upon Aishábái, I asked for further argument, and the matter was fully and ably re-argued a fortnight ago.

After giving the matter most careful and anxious consideration I have come to the following conclusion. It is settled law that the general terms of a release do not include questions that could not have been in the contemplation of the parties[1]. Now, was this present claim of Fátmábái on Aishábái in the contemplation of the parties—or ought it to be reasonably supposed to have

(1) See Story's Equity Jurisprudence, sec. 145. Pollock on Contracts, p. 475.

been in their contemplation at the date of release? The claim did exist at the time in the sense of its being a present right to a contingent interest, the contingency not having yet arisen. Was the contingency, *i. e.* the remarriage of Aishábái, so improbable that it escaped consideration? Fátmábái cannot be considered to have been ignorant of her alleged right to the whole on the remarriage, as she brought this suit at once on that event occurring, and she set up a custom which can only be proved on the basis of frequent remarriages in her community. I do not think it was a right Fátmábái was likely to overlook.

Another way, no doubt, of considering whether the release covers such a right is to look at the recitals, or at what stands, in this case, in the place of recitals, which are always used as a key to the construction of the general words of a release—*Boyes* v. *Bluck*(1); *Simons* v. *Johnson*(2); *Lyall* v. *Edwards*(3). That is to say, we must look at the terms of the reference, which is of "the suit and all matters in difference between the parties"; and we must next consider, from the pleadings, what were "the matters in difference." We find them to be a claim on the part of Fátmábái as widow, and a denial of the claim and of the widowhood on the part of Aishábái. That was the matter in difference which was referred to arbitration. If the operative words are to be wholly controlled by the recitals in all cases, I should, I think, be bound to hold that the award referred to the matter in difference only, and that the right intended to be released by general words was only Fátmábái's right *as widow* on the estate in Aishábái's hands as widow. But the operative words must not be controlled and interpreted by the recitals only. They are one of the tests of the intention of the parties, which must be inferred from all the circumstances. In short, every case must stand on its own facts, and the facts here are (1) no issues were raised; (2) there were no direct findings on the precise points in dispute; (3) the sum awarded to Fátmábái was less than one-half which she would have taken as widow; (4) the arbitrators never, in terms, decided the main question at all; (5) although the award was defective from want of findings on all the matters in difference, there was no objection taken by either

(1) 22 L. J. C. P., 173. (2) 3 B. & Ad., 175.
6 H. & N., 337: 30 L. J. Ex., 193.

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side to its validity; (6) that, in short, the arbitrators diverged from the submission, and the parties consented to the divergence. All these facts made me think there was a distinct intention amongst all the parties that the decision arrived at by the arbitrators should be treated by all the parties as a sort of final compromise and settlement, not only of the disputes submitted, but of all the disputes that could arise between the two ladies as regards the estate of the deceased husband. This view accounts for the comprehensive terms of the operative part of the release, whose introduction otherwise it is almost impossible to explain. It can hardly be said that the terms have no meaning. Two experienced lawyers conducted the case for the parties, and two other experienced lawyers acted as arbitrators, and gave the award such terms as "all claims whatsoever upon the estate shall be absolutely waived for ever", and "Aishábái is entitled absolutely to all the rest of the estate as her sole property as against Fátmábái". These words would not have been used by able lawyers, nor would they have been adopted by the parties who were acting under advice in their consent decree, if they had not intended to settle all possible claims. It seems to me the consent decree was a sort of family arrangement intended to finally close very disagreeable litigation.

If I am right in my view of the award and decree, *viz.*, that when read by the light of the facts and circumstances they must be taken as a final settlement of all disputes, then the particular claim put forward by the present suit must be taken to be included, unless it was non-existent at the time. But, as I have already said, it was a present right dependent on a contingency, and did then exist just as much as a right contingent on a death exists. Remarriage clearly, in Fátmábái's opinion, obtains in her community, as she bases her claim on a custom by which Aishábái forfeits the estate of her husband whenever she takes to herself a second.

I think, therefore, the terms used must be held to cover, and to have been intended to cover, Fátmábái's rights in case of Aishábái's remarriage. It was argued that this question is concluded

by the decision of the Privy Council[1], and that I am bound to hold that Fátmábái only waived her right on the property so far as it was a widow's estate in the hands of Aishábái. In that case by a family arrangement a childless Hindu widow was given Rs. 55,000 "for her sole absolute use and benefit". Yet in spite of those words she was held to have taken, with reference to her husband's representatives, only a widow's estate, and not an estate to her separate use in the English sense. But their lordships say the money was given for her absolute use as against the parties to the deed, and that the deed was intended to settle all accounts between the parties. Applying that decision to the present matter, I should say that as against Fátmábái, a party to the release, Aishábái held absolutely, although, as against other members of the husband's family, Aishábái may only hold a widow's estate. If I were to follow the case cited in *Bolye Chund Dutt* v. *Khetterpaul Bysack*[2] there would be no difficulty in saying that Fátmábái intended to convey an absolute estate, as the words here are as strong, if not stronger, than the words which the Court had to construe in that case.

I think, on the whole, the award and release must be held to constitute a binding agreement by which Fátmábái, for the sum of 55,000 rupees, waived all her rights against Aishábái, including the present claim. I, therefore, decide the preliminary issue in favour of the defendant. The suit must be dismissed with costs.

Attorneys for the plaintiffs:—Messrs. *Tyabji and Dáyábhái.*

Attorneys for the defendant:—Messrs. *Bháishankar, Nánábhái and Dinshá.*

(1) 6 Moore Ind. Ap., p. 1. (2) 11 Beng. L. R., 450.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

1888. *March 30, April 6.*

E. C. K. OLLIVANT, (ORIGINAL DEFENDANT), APPELLANT, v. RAHIMTULA' NUR MAHOMED AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Municipal Act (Bombay) III of 1872, Sec. 195—Obstruction—Power given in Act for public benefit—Construction.

The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May, 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being "a projection, encroachment or obstruction" within the meaning of section 195 of Acts III of 1872 and IV of 1878. The plaintiff thereupon filed this suit, praying for an injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the roadway. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. That gutter, however, subsequently to the filing of this suit, but before the hearing, was covered over, and so much additional width was thereby added to the road.

Held, that the eaves constituted an obstruction within the meaning of the above section, and that the Municipal Commissioner was entitled to remove them.

Under the above section the question to be decided is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature it would have been expressed.

Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage.

SUIT against the Municipal Commissioner of Bombay for an injunction to restrain him from removing certain eaves from two buildings belonging to the plaintiff alleged by the defendant to project over the public road.

On the 17th May, 1886, the Municipal Commissioner sent a notice to the plaintiff, requiring him within thirty days to remove the said eaves erected in front of his buildings on Parel Road, Bombay, as being "a projection, encroachment, or obstruction within the meaning of section 195 of Acts III of 1872 and

* Suit No. 293 of 1886.

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IV of 1878 "(1); and stating that, in default of the said eaves not being removed by the plaintiff, he (the Municipal Commissioner) would cause the work to be done as directed by the said Acts. The plaintiff thereupon (*viz.*, on the 19th July, 1886,) filed this suit praying for an injunction.

The plaint stated that the buildings in question had been erected more than fifty years previously, and that the roofs, which the defendant now alleged to be an encroachment or obstruction, had existed in the same position ever since the said buildings were erected

In his written statement the defendant (the Municipal Commissioner) contended that he was entitled to remove such portion of the plaintiff's roofs as projected over the public street as being an obstruction to the safe and convenient passage along the street He alleged that the eaves of the roofs of one of the plaintiff's buildings projected one foot eight inches over the street beyond the wall of the building, and descended to about seven feet above the level of the roadway, that the eaves of the other building projected over the street for a distance of one foot ten inches, and descended to about nine feet two inches above the level of the roadway. The following paragraphs of the written statement are material :—

(1) "Section 195.—The Commissioner may give notice, in writing, to the owner or occupier of any house or building to remove or alter any projection, encroachment, or obstruction which, although erected before this Act comes into operation, shall have been erected or placed against, or in front of, such house or building, if the same overhangs or juts into, or in any way projects or encroaches upon, any public street, so as to be an obstruction to the safe and convenient passage along such street, or if the same projects or encroaches into or upon any uncovered aqueduct, drain, or sewer in such street so as to obstruct or interfere with such aqueduct, drain, or sewer, or the proper working thereof, and such owner or occupier shall, within thirty days after the service of such notice, remove such projection, encroachment, or obstruction, or alter the same in such manner as shall have been directed by the Commissioner; and in default thereof the Commissioner may remove such projection, encroachment, or obstruction; and if such projection, encroachment or obstruction shall have been lawfully made, the Commissioner shall make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation, the same shall be ascertained and determined in the manner hereinafter provided."

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"The defendant says that the public street on which the plaintiff's premises are situate is known as the Parel Road. The tramway has been recently laid along the said street. The traffic along the said street is very heavy, as, in addition to the ordinary traffic of the town, all the country traffic from Sálsette into Bombay passes along that street, and large numbers of heavily laden hay and other carts daily pass along the said street. The width of the said street from the New Byculla Bridge as far as the premises to the south of and adjoining the plaintiff's said premises No. 642 is nowhere less than sixty feet; but this having been found to be insufficient, the said street is being gradually widened to a width of seventy-five feet.

"Opposite the plaintiff's said premises No. 642 the width of the said street is much contracted, and is at one point not more than about forty feet.

"The defendant says that at present a side gutter runs along the side of the plaintiff's premises which the defendant is covering over with stone slabs so as to widen the road-space. Carts laden with country produce which pass along the said street are so loaded as to project considerably beyond the wheels of the carts. If the projections of the plaintiff's eaves are allowed to remain, it will be impossible for traffic to use a portion of the said street with safety or convenience."

The suit was heard before Hart, J., on the 28th March, 1887. He passed a decree in favour of the plaintiff, and granted the injunction prayed for, on the ground that the eaves of the plaintiff's building did not constitute any obstruction to the safe and convenient passage along the street.

The defendant appealed. The appeal was heard by Sargent, C. J., and Scott, J.

Farran and *Inverarity* appeared for the appellant.

Lang and *Telang* for the respondent.

SARGENT, C. J.:—In this case the plaintiffs sue to restrain the Municipal Commissioner from putting in force against them the powers vested in the Commissioner by section 195 of Bombay Act III of 1872, by which he is empowered to remove any pro-

jection or encroachment which forms an obstruction to the safe and convenient passage along any public street. It appears that the eaves of certain buildings belonging to the plaintiffs project over the public road to the extent of one foot eight inches, and form the alleged obstruction which the Commissioner desires to have removed. The width of the road in front of these buildings is about forty feet, and the height of the eaves in question varies from seven feet to nine feet two inches above the road way. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiffs' buildings and between them and the road. This gutter, however, has since been covered over, and so much additional width has thereby been added to the road.

The learned Judge in the Court below seems to have based his judgment mainly on the observations which he made himself when visiting the locality. In his judgment he discusses the case with reference to the state of things existing at the date of the hearing at which time the gutter had been covered over. As to this point he says : "I should, I think, be assured that the addition, under such circumstances, of a foot or two to the width of a forty-feet road at its extreme edge, where it is abutted on by a row of open shop fronts, made such a difference in the ordinary existing traffic that the projection of the plaintiffs' eaves, at a height admittedly too great to incommode any ordinary foot passenger, became a source of danger or inconvenience to others. As to this, there was a remarkable dearth of positive evidence on both sides. Not a single witness was called to prove that, as a fact, any one had been or had not been incommoded by the projection. I was simply invited to draw inferences, either way, from evidence of measurements and the state of the traffic on the road." Then he goes on to speak of the traffic in the street, and says : "Such a traffic seemed to me not likely to suffer any appreciable obstruction on a forty-feet road from a twenty-inches' projection at one edge of it seven feet from the ground;" and he concludes by saying : "In regard to the traffic at this point, as I have already stated, it was distinctly sparse, and while I was there no one was in any way obstructed or incommoded by the projection of the plaintiffs' eaves, nor do I think it is likely that

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any one could be in the present state of the road and condition of the traffic."

It is plain, from these remarks, that the learned Judge was of opinion that the question in the case was whether the eaves of the plaintiffs' house constituted a real practical inconvenience to the public traffic in the street. We do not, however, think that that is the question which arises on the proper construction of section 195. If, however, it was material to consider this point, we should think it hardly safe for a Judge to attach much value to what he may himself observe during a short visit to the locality. The amount of traffic may vary greatly from time to time. A good deal of evidence was given upon this matter, and it is upon the recorded evidence that the Court's decision must rest.

It is no doubt a well-recognised general rule, that where powers are given by the Legislature to interfere with private property these powers are to be exercised strictly and exclusively for the purposes and objects for which they were given; and unless it can be shown that such interference is necessary for the furtherance of those objects it will not be permitted. That is the general rule which is applied, in the case of railway and other companies authorised to take compulsorily the lands of others. But in applying this rule, the powers conferred on municipalities and corporations for the purpose of making improvements in large towns or doing other similar acts for the public benefit have always been liberally construed—*Galloway* v. *The Mayor and Commonalty of London*(1) and *Quinton* v. *Corporation of Bristol*(2).

What, then, are the provisions of section 195? They empower the Commissioner to effect the removal of "any projection, encroachment, or obstruction.....if the same overhangs or juts into, or in any way projects or encroaches upon any public street as to be an obstruction to the safe and convenient passage along such street." The learned Judge in the Court below read those words as intended to apply only to such an obstruction as would interfere with the traffic along such street. But the words in their plain and obvious meaning, import "passage along the

(1) L. R., 1 Eng. & Ir. Ap., 34. (2) L. R., 17 Eq., 524.

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the whole of the street"; and if the intention of the Legislature had been as contended for the plaintiffs, we should have expected to find it clearly expressed. The question, however, is not clear of authority.

In the case of *Bagshaw* v. *Buxton Local Board of Health*(1) a question was raised upon precisely similar words in an English statute. In that case the defendants objected to a small enclosed garden in front of the plaintiff's house in which plants and shrubs were growing as "an obstruction to the safe and convenient passage" along the street. The plaintiff sued to restrain the defendants from removing the alleged obstruction or interfering with the plaintiff's enjoyment of his garden. The street was thirty-six feet wide. Jessel, M. R., said: "I have no doubt that the wall and shrubs have obstructed, and that they are obstructions; so that the only question remaining is whether they are obstructions 'to the safe and convenient passage along any street.' The words 'along a street' mean along the whole of the street; and if you take and enclose a portion of the street itself, how can it be said that that is not an obstruction to the safe and convenient passage along the street? It appears to me that I should be cutting down this Act of Parliament and making it almost meaningless if I so held, and I am of opinion, therefore, that the defendants are entitled, under the section in question, to remove this, being, as it is, in front of the house."

We think, therefore, that upon the proper construction of section 195, the question to be considered is merely whether the eaves were an obstruction; and as to this it is not denied they are an obstruction to the convenient passage along that part of the street. We do not consider that the fact of the gutter having been covered over after the filing of the suit affects this question. It is the eaves which constitute the obstruction. They, of course, prevent loaded carts from passing as near to the wall of the plaintiffs' house as it would be possible for them to do if the eaves were not there, so that the result is the same whether we have regard to the state of things at the date of the filing of the suit or the date of hearing.

(1) L. R., 1 Ch. Div., 220, at pp. 223 and 224.

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We must hold that the Commissioner was entitled to have the eaves of the plaintiffs' buildings removed, and we reverse the decree with costs.

Attorneys for the appellant:—Messrs. *Crawford and Buckland.*

Attorneys for the respondents:—Messrs. *Payne, Gilbert, and Sayáni.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *October 4.*

SHRIDHAR AND ANOTHER, (ORIGINAL OPPONENTS), APPELLANTS, *v.* HIRA'LA'L VITHAL AND ANOTHER, (ORIGINAL APPLICANTS), RESPONDENTS.*

Hindu law—Marriage—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.

The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty, the Court may interfere even in the case of a father.

One Girdhar died, leaving a widow and an infant daughter named Báni. After Girdhar's death, his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parents' house. There she died about eighteen months after Girdhar's death. The orphan Báni was then brought up by her maternal uncles, Shridhar and Goverdhan.

When Báni became ten or eleven years old, her paternal uncle Hirálál and paternal grandmother Rakhmábái sought, under Act IX of 1861, to take possession of the minor Báni from the custody of her maternal uncles. This application was resisted by Shridhar and Goverdhan, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhátiá in Bombay for a large sum of money.

The Court found that several Bhátiá girls of Dharangaon, where the parties resided, had of late been married to old Bhátiás in Bombay, the girls' relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court.

* Appeal, No. 94 of 1886.

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Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizápur, a town in the Nizám's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioners' custody a month before the day fixed for the marriage. Against this order Shridhar and Goverdhan appealed to the High Court.

Held, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they had never taken care of the girl, it was necessary, in the interests of the minor, to put them upon terms to prevent the possibility of their abusing their authority to the minor's prejudice.

Held, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Courts in British India.

Held, also, that the girl ought not to be forced into marrying a person whom she did not like.

APPEAL from the order of G. McCorkell, Acting District Judge of Khándesh, in Miscellaneous Application No. 44 of 1885.

In this case one Hirálál and his mother Rakhmábái sought to obtain possession of the minor Báni, who was the daughter of Hirálál's brother Girdhar.

Girdhar died when Báni was three months old. Owing to the unkindness of her mother-in-law, Báni's mother was driven to seek refuge with her brothers Shridhar and Goverdhan. She died about a year and a half after her husband's death. Báni was thenceforward brought up by her maternal uncles.

When Báni became ten or eleven years of age, Hirálál and his mother Rakhmábái sought, under Act IX of 1861, to take possession of the minor from the custody of her maternal uncles.

Shridhar and Goverdhan opposed this application, on the ground that Hirálál was actuated by selfish and mercenary motives, and intended to sell the girl to an old Bhátiá in Bombay for a large sum of money, without any regard for the girl's interests. They contended that he should not be allowed to have possession of the minor without undertaking to marry her into a respectable family at Dharangaon, which was her native place, and not to an old man or for money.

The Acting District Judge found that several Bhátiá girls of Dharangaon had recently been married to rich old Bhátiás of

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Bombay, the girls' relatives receiving large sums of money. He was of opinion that it was for the interest of the minor Báni that the Court should try to prevent the possibility of her being given in marriage to an unsuitable husband, especially as she never had lived with Hirálál, who was not likely to have so much affection for her as her maternal uncles.

The Court, therefore, passed the following order :—

"The minor Báni is for the present to remain in the custody of her maternal uncles Shridhar and Goverdhan. Petitioners are directed to find a suitable husband for Báni, and to inform opponents, through this Court, of his name and place of residence within six months from this date. Should opponents show no valid reason why the marriage should not be allowed, the Court will order that the custody of the minor be given to petitioners, that they may marry her to the person thus approved."

One Jivandás Dayál, residing at Vaizápur, in the Nizám's territory, was proposed by Hirálál and approved by the Court as a suitable husband for Báni. Shridhar and Goverdhan objected to the match, but their objections were overruled, and the Court passed an order authorizing Hirálál and Rakhmábái to give the minor in marriage to Jivandás, and to obtain the custody of the minor one month before the date fixed for the marriage ceremony.

Against this order Shridhar and Goverdhan appealed to the High Court.

Ganpat Sadáshiv Ráv for the appellants :—The minor was abandoned by her father's relatives. They have, therefore, lost their right to the custody of the girl. If a father deserts his wife and daughter, he forfeits his right of giving his daughter in marriage—*Modhoosoodun Mookerji* v. *Jadub Chunder*(1); *The King* v. *C. Kistnama Náick*(2). *A fortiori* a person who has taken no care whatever of his brother's infant daughter forfeits his right, if any, to give her in marriage. Nárada (ch. XII, s. 20, p. 82) says that failing the parents a maternal uncle has a better right to give a girl in marriage than the paternal uncle. See also

(1) 3 Calc. W. R. Civ. Rul., 194. (2) 1 Nort. L. Ca., p. 1.

Yádnavalkya, ch. I, sec. 63; and Stoke's Hindu Law, p. 28. Independently of these texts, it is the duty of the Court to protect the interests of the minor girl. In the present case the uncle has selected a husband who lives in the Nizám's dominions, and over whom, therefore, the Courts in British India will have no control. To marry the girl to such a person would be to place the minor out of the protection of our Courts.

Dáji Abáji Khare for the respondents :—The lower Court has approved the candidate proposed by the uncle. The appellants objected on the ground that the uncle intended to sell the girl for a price. This has not been proved. Under the Hindu law the paternal relatives of a girl have a preferential right to give her in marriage. The Hindu law make a distinction between guardianship for marriage and guardianship for protection of property. The Hindu law gives the sovereign the guardianship of the property of minors, but does not empower him to dispose of a girl in marriage. Maine's text in ch. VIII gives a girl the right to choose a husband for herself, if her parents and relations neglect their duty to find a husband for her. Refers to Colebrooke's Digest, Book V, ch. VIII, 450, 451; Tágore's Law Lectures for 1878, p 49; 1 Strange's Hindu law, p. 101; *Kanahi Rám* v. *Biddya Rám*[1].

WEST, J. :—In this case one Girdhar Vithal died, leaving a widow and an infant daughter, named Báni, who was but a few months old at the time of Girdhar's death. Her mother Mathurábái seems to have been forced by the unkindness of her mother-in-law Rakhmábái to go away from the house of her husband's family and take refuge with her brothers Shridhar and Goverdhan. In their house she died about eighteen months after the death of her husband, and the orphan Báni has, since her mother's death, been brought up by Shridhar and Goverdhan.

It appears that a few years ago the brother of Girdhar Vithal, who is named Hirálál, endeavoured through the Mámlatdár to obtain the custody of Báni's person. He failed in this attempt, and as the Mámlatdár was not the proper authority to apply to, no significance can be attached to the application. Had Hirálál

(1) I. L. R., 1 All., 549.

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seriously desired to insist on his right and to take on himself the burden of the guardianship of the orphan Báni, he would have applied to the Civil Court either under Act XX of 1864 or under Act IX of 1861.

It was under the latter Act that an application was at length made in the present case by Hirálál and Rakhmábái to withdraw Báni, who was then ten years of age, from the care of her uncles into their own custody and guardianship. The declared object was to get the girl married. It appears in evidence that a practice has grown up in the caste, which, though disapproved, prevails more and more, of selling young girls as wives to aged men. Shridhar and Goverdhan, on this ground, opposed the application of Hirálál and Rakhmábái, which, as they alleged, could not, under the circumstances, have been dictated by any affectionate regard for Báni and her interests.

The District Judge would not order a transfer of the custody of Báni's person unconditionally to the applicants Hirálál and Rakhmábái. But recognizing Hirálál's preferable right as Báni's paternal uncle to general guardianship, he allowed him to propose a husband for her in competition with one to be named by Shridhar and Goverdhan. The young man named by the uncle, and preferred by the District Judge, is one Jivandás, and the District Judge has ordered that Báni be handed over to Hirálál one month before a day to be fixed for her marriage to this person.

The general authority, failing the father of the paternal relatives, to dispose of a girl in marriage is recognized by the Hindu law writers as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant[1]. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon such terms as may appear necessary in order to prevent the authority from being abused to the injury of the infant Where a father or mother is the guardian, the intervention of a law Court can very seldom be necessary or desirable. In the case

(1) See West and Bühler, pp. 232, 673 (3rd ed.); *Nándlál* v. *Tápidás*, 1 Borr. R., at p. 19; *Kumla Buhoo* v. *Mánishankar*, 2 Borr., 740, 748; 1 Str. H. L., 101; 2 *Ib.*, 204 (ed. of 1825).

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of very gross misconduct and disregard of paternal duty, the Court may interfere, even in the case of a father[1], but the distinction between a parent and a more distant relative has been recognized by the English Courts[2] and is founded in nature[3]. Had the uncle of Báni been her father, his conduct towards her would have been wholly unnatural; as it is, his long-continued indifference raises a strong suspicion that his proposal as to her marriage may not have been dictated by a purely disinterested regard for her happiness. The young man Jivandás has no means or business of his own. He holds the somewhat precarious position of assistant in a cloth shop at Vaizápur in the territory of His Highness the Nizám. Without in any way impugning the character of this candidate for Báni's hand, we may say that we have not the same guarantees for it that we should have if he were a resident in British territory. In approving Báni's marriage to him we should virtually remove her, at twelve years of age, beyond the jurisdiction of the Court, which is bound to protect all helpless subjects of the State. The texts relied on by Colebrooke in 2 Strange's Hindu Law, 73, 74, 75 (ed. of 1830) for the doctrine of a general supreme guardianship of the State have in view no doubt—at least primarily—the protection of a minor's estate[4], and should not be allowed to overrule the specific provisions made by the Hindu law for the disposal of a girl in marriage. But the extended authority ascribed by Colebrooke and Strange to the Sovereign and the State is consistent—an opposite view would indeed be inconsistent—with the range of authority assigned to the Courts by the chief Hindu writers over all matters in litigation of sufficient importance to the community to be worthy of the attention of the king[5]. We may, therefore, in perfect consonance with the precepts of the Hindu lawgivers, impose such terms in the present case as shall seem expedient on the aid we are asked to give to Hirálál in disposing of Báni.

(1) *The King* v. *C. Kistnam Náik*, 2 Str. Notes of Cases, 89; 1 Nort. L. Ca., 1.

(2) *Ex parte Hopkins*, 3 P. Wms., 151. (3) *Roach* v. *Garvan*, 1 Ves. Sen., 158.

(4) Coleb. Dig., Bk. V, t. 450, 451.

(5) See West and Bühler's Hindu Law, p. 239 (3rd ed.), and the chapter of the Mitákshara on Judicature.

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It seems that brides are scarce in the caste. It does not appear that Báni has any liking for Jivandás. Hirálál should find for Báni a husband within British territory and under this Court's jurisdiction. He may be allowed six months for this purpose, and the opponents Shridhar and Goverdhân are to afford every facility for the marriage of Báni to the person proposed and approved by the District Judge. Failing such an arrangement, the local *panchâit* of the caste may, as proposed by Shridhar and Goverdhan, be asked to name a bridegroom to whom Báni may be married when he is approved by the Judge. The Judge will, of course, see that Báni is not in either case forced into a marriage that would be odious to her.

The parties severally to bear their own costs in this Court.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood

1887. *October* 4.

PITÁMBER VAJIRSHET, (ORIGINAL DEFENDANT), APPLICANT, *v.* DHONDU NAVLA'PA', (ORIGINAL PLAINTIFF), OPPONENT.*

Jurisdiction—Appeal—Suit cognizable by a Court of Small Causes—Act XI of 1865, Secs 2, 6, 12, 21—*Act XIV of* 1869, *Sec.* 28—*Subordinate Judge invested with small cause powers—Final decision.*

The plaintiff sued to recover Rs 5 as damages for the wrongful removal of a tree The suit was filed in the Court of a Second Class Subordinate Judge, who was invested, under Act XIV of 1869, sec. 28, with the jurisdiction of a Judge of a Court of Small Causes.

The case, which was in itself of the nature of a small cause, was, however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree, and awarded the claim.

Held, that the suit having really been a small cause, no appeal lay to the District Court, though the Subordinate Judge did not use the procedure of Act XI of 1865 Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time.

A suit taken cognizance of under sections 2, 6 or 12 of the Mofussil Small Cause Court Act (XI of 1865), does not cease to be a suit tried under the Act, because of

* Application No. 76 of 1887 under extraordinary jurisdiction

some divergence from its summary procedure. A surplusage of form and elaborateness does not change the character of the decision for the purpose of its finality.

Section 28 of the Bombay Civil Courts' Act (XIV of 1869) does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts; but still it creates an additional and distinct jurisdiction.

Since Act IX of 1887 came into force, the Court is to be regarded as two Courts in such cases.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff sued to recover Rs. 5 as damages for the defendant's wrongful act in cutting and removing a tree from his land.

The suit was filed in the Court of the Second Class Subordinate Judge at Mahad, who was invested with the jurisdiction of the Judge of a Court of Small Causes under section 28 of Act XIV of 1869.

The Subordinate Judge dealt with the case as an ordinary suit according to the rules of the Code of Civil Procedure. He found that the tree did not belong to the plaintiff, and rejected his claim.

The plaintiff appealed to the District Judge, who reversed the decision of the Subordinate Judge, and awarded the plaintiff's claim.

Thereupon the defendant applied to the High Court, under its extraordinary jurisdiction, for a reversal of the Appellate Court's decree, on the ground that the suit being one cognizable by a Court of Small Causes, the decision of the Subordinate Judge was final, and that, therefore, no appeal lay to the District Court.

A rule *nisi* was issued, calling upon the plaintiff to show cause why the decree of the District Court should not be set aside as *ultra vires*.

Shámráv Vithal, for the plaintiff, showed cause:—The suit was not tried as a small cause. The Subordinate Judge did not exercise the jurisdiction vested in him under section 28 of Act XIV of 1869. He tried the case according to the rules of the Civil Procedure Code. Section 21 of Act XI of 1865 does not, therefore, apply. The decision is final only when the case is

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tried under the procedure laid down in Act XI of 1865. Refers to *Dámodhar Timáji* v. *Trimbak Sakhárám*[1]; *Malhári* v. *Narso Krishna*[2].

The latter case shows that a Subordinate Judge invested with small cause powers under section 28 of Act XIV of 1869 is not to be regarded as a Judge of two Courts, though he exercises a double jurisdiction. He remains Judge of a subordinate Court, and, therefore, his decision in a case tried by him as an ordinary suit is appealable. The defendant did not object to the jurisdiction of the District Court at the hearing of the appeal. It is now too late to challenge the District Court's jurisdiction. And this Court as a Court of Revision is not competent to entertain the objection. Refers to section 11 of Act VII of 1887.

Nárayan Ganesh Chandávarkar, for the defendant, was not called on.

WEST, J.:—In this case the plaintiff sued for damages for the wrongful removal of a tree. The Court of first instance rejected his claim, which was in itself of the nature of a small cause, but which the Subordinate Judge, though invested with the jurisdiction of a Judge of a Small Cause Court, tried according to the rules of the Code of Civil Procedure. An appeal was made to the District Court, which reversed the Subordinate Judge's decree and awarded the sum claimed, Rs. 5, with costs.

To the objection now raised, that no appeal lay to the District Court, it is answered that as the Subordinate Judge did not use the procedure of Act XI of 1865 in trying the case, he must be held to have tried it under his ordinary jurisdiction. Hence it is urged it was not a case to which section 21 of the Act or indeed any section of it applied, and, therefore, under section 540 of the Code of Civil Procedure, the appeal was properly admitted. But though section 28 of Act XIV of 1869 does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts, it still creates an additional and distinct jurisdiction. (Under the recent Act IX of 1887, sec. 33, the Court is to be regarded as two Courts in such cases.) The

(1) I. L. R., 10 Bom., 370. (2) I. L. R., 9 Bom., 174.

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Small Cause Court jurisdiction is in its nature exclusive. This appears from section 2 of Act XI of 1865, from section 6 of the same Act, which enumerates the suits cognizable by a Small Cause Court, and from section 12, which says no suit of these kinds shall be tried by any other Court where a Small Cause Court exists. When section 21 says that "in suits tried under this Act, all decisions and orders shall be final," it means suits tried under this Act according to the jurisdiction created by sections 2 and 6. A suit taken cognizance of under these sections does not cease to be a suit tried under the Act, because of some divergence from its summary procedure. A surplusage of form and elaborateness does not change the character of the decision for the purpose of its finality.

The suit was filed in a Court having a double jurisdiction. But the jurisdiction under which cognizance could be taken of the claim was one and one only, not a double or an alternative jurisdiction. Having the Small Cause Court jurisdiction the Subordinate Judge must have dealt with this case under that jurisdiction, even if he was not quite alive to it at the time—*Dr. Grosvelt* v. *Dr. Burwell*[1]. We must ascribe his acts to an actual existing authority under which they would have validity rather than to one under which they would be void. A similar principle applies to the District Court, and if we could find that there was authority in that Court to receive an appeal in this case, a mere error in the subsidiary proceedings would not cancel that jurisdiction But the suit having really been a small cause, no appeal lay; there was an absolute want of jurisdiction in the District Court, and the Act VII of 1887, on section 11 of which Mr. Shámráv relied, not having come into operation when the appeal was tried, we must reverse the decree of the District Court, and restore that of the Court of first instance.

The parties severally are to bear their own costs here and in the District Court.

Decree reversed.

(1) 1 Ld. Raym., p. 454.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. October 5.

NAGAR VALAB NARSI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPALITY OF DHANDHUKA, (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay District Municipal Act (VI of 1873), Sec. 17—Street—Authority of the Municipality under Section 33—Civil Courts' interference with the discretion given to public bodies.

The word "street" in section 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes.

The plaintiff proposed to make a balcony projecting over a public road. The Municipality objected to the work, as an encroachment on a public street. He, therefore, sued the Municipality to establish his right to build the proposed balcony.

Held, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street.

Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner.

The plaintiff was the owner of two houses on each side of the passage of a *khidki*, or open square, containing three or four other houses. He proposed to connect the two houses by building a story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local Municipality for permission to build in the manner he proposed. The Municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses.

The plaintiff thereupon sued the Municipality to establish his right to build the proposed structure. It was contended for the plaintiff that the Municipality ought not to have refused permission in the interests of the neighbouring householders, who were able to protect their own rights in case of injury.

Held, that the suit would not lie, as the order of the Municipality refusing permission was not an unreasonable one under the circumstances of the case.

Held, further, that the authority of the Municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

* Second Appeal, No. 615 of 1885.

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SECOND appeal from the decision of A. Showan, Assistant Judge of Ahmedabad, in Appeal No. 159 of 1883.

The plaintiff sued to establish his right to build a certain superstructure on open ground lying between two houses belonging to him and facing each other, and also to make a hanging balcony, with a weather-frame over it, adjoining the two houses and the proposed new structure.

The plaintiff's premises were situated in a *khidki*, or open square, formed by a number of houses, two of which belonged to the plaintiff and the others to the defendants Nos. 2—5. The houses were in two rows, facing each other on opposite sides of the square. The only entrance was by a door on the side of the *khidki* which faces the street. On the two sides of the entrance stood the two houses belonging to the plaintiff opposite each other, and separated by the central passage of the *khidki*. He proposed (1) to connect these two houses by building an upper story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro; and (2) to make a balcony overhanging the street outside.

The plaintiff applied to the Municipality of Dhandhuka for permission to build in the manner he proposed. The Municipality refused permission, on the ground that the proposed structure above the passage was likely to interfere with the access of light and air to the neighbouring houses, and that the balcony would be an encroachment on a public street.

The plaintiff thereupon filed the present suit against the Municipality.

The plaintiff alleged that the Municipality were wrong in refusing to grant the permission he had applied for; that it was not necessary for the Municipality to consider the interests of third parties, who ought to have been left to protect their own rights in case of injury; and that the houses in the *khidki* had been formerly divided between the members of a family, and that by the deed of partition a right was reserved to build on the ground in question.

The defendant No. 1, the Municipality, pleaded that the place where the plaintiff wanted to build had always been open ground;

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that the objection to granting permission was that the plaintiff's proposed building would obstruct the access of light and air to the neighbours; and that the matter was one in the discretion of the Municipality.

Defendants Nos. 2—5, who were subsequently added as parties, contended that they were joint owners of the *khidki* with the plaintiff, and had a right of way over the open ground between the two houses belonging to the plaintiff; that the plaintiff had no right to build on the open ground; and that the proposed building would interfere with their enjoyment of light and air.

The Subordinate Judge found that the supply of light and air to the houses of defendants Nos. 2—5 was likely to be diminished if the plaintiff were allowed to build the proposed structure, and that the Municipality had used its discretion wisely in refusing permission. The plaintiff's suit was, therefore, dismissed

This decision was confirmed, on appeal, by the Assistant Judge. His reasons were stated as follows:—

"I hold that section 33 of the Municipal Act (Bombay) VI of 1873 gives the Municipality power to deal with a question like the present. The terms of that section are quite general. Any one beginning to erect a building, or alter externally, or add to an existing building, *any where*, must give the Municipality notice, and the Municipality may thereon issue orders of approval or otherwise. And if they are not to be applied to when the building is, as in the present case, actually on the public street, it is difficult to imagine a case in which they require to be consulted. Besides, if the case was beyond the Municipality's jurisdiction, why did plaintiff apply to them at all?

"Next, as to their reasons for refusing permission. They said as regards the structure above the passage, that it would lessen the supply of air and light to the other dwellers in the *khidki*, and it has always been said, in the course of the case, that, if fire broke out inside the *khidki*, assistance could be rendered less easily than now. And there is no doubt, that, as regards air and light, the objection of the Municipality is a good one. The main

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supply of air to the people inside the *khidki* and a good deal of the light must come at present through the opening between his houses, which plaintiff proposes to block up; and as regards fire, the proposed addition certainly would not improve matters. But, at any rate, I hold that on the score of obstruction of light and air the Municipality were quite justified in acting as they did. They are trustees of the public, and responsible for preventing anything which would affect the sanitary condition of the town. It is impossible in this case to say they acted unwisely in forbidding a man to block up the passage between two houses which had from time immemorial conveyed air and light to persons dwelling behind him. There are only three or four houses behind, it is true, and it is also the case that the owners would have their remedy. But, however few, they are members of the public, and entitled to consideration by the Municipality. I see no reason to interfere with this exercise of discretion on the part of the latter.

"So as to the proposed balcony, two and a half feet broad, overhanging a roadway of eighteen feet. The road cannot be called a broad one. Any diminution of the space between the houses on either side is to be deprecated. Plaintiff has no *otlá* on, or any right to, the ground below. I cannot say that the refusal to allow balconies on houses in a road only eighteen feet in breadth is so plainly unreasonable that I should interfere with it."

Against this decision the plaintiff appealed to the High Court.

Ráv Sáheb *Vásudev Jagannáth Kirtikar* for the appellant:—The Municipality had no right to forbid the proposed structure. They cannot interfere with private rights. The authority given to the Municipality under section 33 of Bombay Act VI of 1873 is to be exercised only for sanitation. The *khidki* in question is not public ground; it is private property. The Municipality had no right to interfere on behalf of three or four families who reside in the neighbourhood. Refers to *Empress* v. *Sadánand Shrikrishnaji*(1); *Kálidás* v. *The Municipality of Dhandhuka*(2);

(1) I. L. R., 8 Bom., 151.

(2) I. L. R., 6 Bom., 686.

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Chairman of the Naihati Municipality v. *Kishori Lal Goswami*[1]; *Wandsworth Board of Works* v. *United Telephone Company*[2].

Ráv Sáheb *Vishvanáth Náráyan Mandlik*, for the respondent, was not called on.

WEST, J. :—The defendants other than the Municipality of Dhandhuka were improperly admitted as parties to set up a case against the plaintiff which had no natural connexion with the suit as against the Municipality. Whether the added defendants had a right to an injunction or other relief against the plaintiff, on the ground of his proposed erection interfering with the access of light and air to their premises, was a question entirely different from that of whether the plaintiff had a good ground for relief against the Municipality, which had forbidden him, under section 33 of Bombay Act VI of 1873, to go on with his proposed building. The case has been disposed of entirely by reference to the authority asserted by the Municipality and denied by the plaintiff, and we propose to limit ourselves to the contention on that point without pronouncing on the private rights and obligations subsisting or not subsisting between the plaintiff and the defendants Nos. 2—5.

The plaintiff being owner of the houses on each side of the passage of a *khidki* containing three or four other houses, proposed to build across the passage at such a height as not to interfere with the passage of those entitled to go to and fro. The municipal commissioners forbade the work, as calculated to interfere with the access of light and air to the houses inside the *khidki*. It is now contended that the commissioners had no right to interfere or to refuse permission to build on such a ground as this. The protection of the rights of the neighbouring householders ought, it is urged, to have been left to the householders themselves. The section, however, (section 33 of Bombay Act VI of 1873) under which the permission of the commissioners was sought and refused, is, as the Assistant Judge has pointed out, perfectly general in its terms. It does not follow that the commissioners could, therefore, exercise the authority thus given to them in a capricious, wanton, and oppressive manner

(1) I. L. R., 13 Calc., 171. (2) L. R., 13 Q. B. Div., 904.

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Public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically (see *Inader* v. *Moxon* [1] approved by Gibbs, C. J., in *Sutton* v. *Clarke*[2]). But the case last cited shows that public functionaries, acting within the limits prescribed by the statute which gives them authority, are not subject to a suit for thus discharging their duties according to their judgment. A public body must keep within its powers, and must use them considerately (see *per* Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* [3], but so acting it is safe—*Dixon* v. *The Metropolitan Board of Works* [4]). There is a further principle of great importance laid down by Lord Selborne, L. C., in *Clark* v. *School Board for London* [5]. His Lordship says: "It seems to me that the Legislature, in authorizing the School Board, for important public purposes, to exercise these large powers .....meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them." The late Sir G. Jessel, M. R., citing this *dictum* in *Duke of Bedford* v. *Dawson* [6] adds that "the public body.....are to be the judges, subject to this, that if they are manifestly abusing their powers .....the Court will say it is not a fair and honest judgment, and will not allow it." These cases define with clearness what discretion a public body may use and at what point the interference of the Courts is justifiable. In the present case, the Courts below have found that the order of the commissioners was not an unreasonable one. That is a question of fact rather than of law; but we concur in the view taken by the Courts below, and we do not think that the authority of the commissioners was in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

As to the balcony proposed to be thrown out over the street, the section (17) of the Act which vests "streets" in the Municipality, though it gives perhaps only a limited estate, yet gives not merely the bare surface of the ground, but so much above

(1) 2 W. Bl., 924.
(2) 6 Taunt. at p. 43.
(3) L. R., 3 App. Ca. at p. 455
(4) L. R., 7 Q. B. Div., 418.
(5) L. R., 9 Ch. App. Ca., 122.
(6) L. R., 20 Eq. Ca., at p. 358.

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and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes (see *Coverdale* v. *Charlton* (1) and Lord Bramwell cited by Brett, M. R., in *Wandsworth Board of Works* v. *United Telephone Company* (2)). It is obvious that if the column of space standing over a street were occupied by projections, the interception of air and light would greatly impair the use of the area as a street. So far, therefore, the column of space is vested as part of its property in the Municipality, and the commissioners were justified in forbidding the plaintiff to occupy it with his balcony, and thus begin a series of encroachments which might cause serious mischief.

For these reasons we confirm the decree of the District Court, with costs of the Municipality as against the plaintiff.

Decree confirmed.

(1) L. R., 4 Q. B. Div., 104. (2) L. R., 13 Q. B. Div., p. 913.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

1888. *January* 12.

ZIA'ULNISA BEGAM AND ANOTHER, (ORIGINAL DEFENDANTS), APPELLANTS, v. MOTIRA'M AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

The Nawáb of Surat Act XVIII of 1848, *Sec.* 1—"*Sue forth*," *meaning of —Construction—Sanction obtained after suit filed.*

The expression "sue forth" in section 1 of Act XVIII of 1848 does not mean to sue for and to obtain so as to make the consent of the Governor a condition precedent to the institution of a suit.

Accordingly where the grand-daughter of the Nawáb of Surat was sued along with her husband without previously obtaining the required consent, and it was contended that the suit was irregularly instituted, and the proceedings thereunder void,

Held, that the suit was rightly instituted, such a consent not being a condition precedent to the filing of the suit.

THESE were second appeals from the decision of E. M. H. Fulton, Acting District Judge of Surat.

* Second Appeals, Nos. 395 and 664 of 1884.

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The plaintiffs sued to recover the sum of Rs. 755-7 from the first and second defendants, or, in the alternative, from the third defendant. The first defendant was the grand-daughter of the Nawáb of Surat, and the second defendant her husband. The third defendant was the agent of the first and second defendants alleged to have been authorized by them to carry on pecuniary dealings on their behalf.

The plaintiffs presented their plaint on the 23rd September, 1882, without previously obtaining the consent of Government. On the 30th November following they filed the consent embodied in Government Resolution No. 5593 of 21st November 1882, and a summons was subsequently issued to the first defendant. Some doubt having been entertained as to the sufficiency of the consent so filed, another one was obtained and filed on the 19th January, 1883.

The suit was then proceeded with.

At the outset it was contended *(inter alia)* for the first defendant that the Court had no jurisdiction to receive the plaint on the day it was filed, as the institution of the suit without the previous consent of Government was tantamount to "suing forth a writ or process" within the contemplation of the provisions of section 1 of Act XVIII of 1848[1], and that the subsequent sanction had no retrospective effect.

Both the lower Courts disallowed the contention, and awarded the plaintiffs' claim as against the first and second defendants.

The defendants preferred a second appeal to the High Court.

Shántárám Nárayan for the appellants:—The institution of the suit was bad for want of consent of Government. On the day on which it was filed the suit had long been barred. The Subordinate Judge let it remain pending till the consent was filed, and did not proceed with it, and so the plaint remained

(1) *Section 1.*—No writ or process shall be sued forth or prosecuted against the person, goods or property of the several persons * * * * * unless with the consent of the Governor of Bombay in Council first obtained * * * * and any writ or process sued forth or prosecuted against the person, goods, or property of the said several persons or any of them without such consent as aforesaid, shall be utterly null and void.

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pending before a Court which had no jurisdiction, and it was barred when the consent was filed The expression "sue forth" in section 1 of Act XVIII of 1848 means to sue for and obtain, and, therefore, before the plaintiffs could legally sue the defendants they were bound to obtain the consent. The subsequent consent had no retrospective effect, and the whole procedure is *ab initio* void.

Gokuldás Kahándás for the respondents:—It has been held by the Division Bench of this Court in Appeal No. 68 of 1884, decided on the 4th May, 1887, that no previous consent is necessary under the provisions of section 1 of Act XVIII of 1848. The expression "sue forth" does not mean to sue for and obtain, as contended for the appellants, but bars the issue of any process or writ without such consent. The summons in this case was issued subsequently to the filing of the consent. The proceedings in the suit are good.

Per Curiam:—The contention raised in the present case is as to the meaning of the expression "sued forth" in section 1 of Act XVIII of 1848. That section provides that no "writ or process shall be sued forth or prosecuted * * * unless with the consent of the Governor of Bombay in Council first obtained." The expression "sued forth", it is contended, means "to sue for and to obtain", and that, therefore, the institution of the suit in its inception was void, and the consent subsequently obtained did not cure the defect. The construction thus sought to be put upon the expression "sued forth", so as to make the consent a condition precedent to filing a suit, is, in our opinion, not correct In similar enactments where such a condition is made precedent, the Legislature has clearly expressed their intention. Act XVII of 1873 (Nawáb Nazim's Debts) bars by section 11 "suits" and "process" against the person or property of persons for whose benefit it has been made, unless with the consent of the Governor General in Council. Similarly does Act XX of 1873, sec. 2, (The Prince of Arcot's Act)[1]. Had the intention of the Legislature been that such consent should be previous to filing a plaint under the Act, instead of the expression "sued forth", "sued for"

[1] See Broughton's Civil Procedure Code, p. 60 (ed. 1877).

would have been used. The same interpretation on the section has been put by the Division Bench of this Court(1). In the present case the consent, though it was obtained subsequently to the filing of the plaint, did not, in our view of the section, vitiate the proceedings. We must, therefore, confirm the decree with costs.

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(1) Appeal No. 68 of 1884 decided on 4th May, 1887.

APPELLATE CIVIL.

Before Mr. Justice Nánabhái Haridás and Mr. Justice Jardine.

VISHNU VISHWANATH, (PLAINTIFF), v. HUR PATEL AND OTHERS, (DEFENDANTS).*

1888. *February* 9.

Civil Procedure Code (Act XIV of 1882), Sec. 257A—Decree—Havdla or undertaking by a third party to pay decreed debt for the judgment-debtor—Agreement incorporating the havdla, in substitution of the decree, capable of execution at the date of the agreement—Suit on such agreement.

The plaintiff obtained a money decree against the defendant Hur Patel, and in execution thereof attached his property. Thereupon, at Hur Patel's request, five persons gave a *havdla* or oral undertaking to pay the amount of the decree, and the attachment was removed. It appeared that some payment was made under the *havdla*. Subsequently Hur Patel and the defendants Nos. 2 and 3 executed a bond to the plaintiff reciting the *havdla*, the payment thereunder, and agreeing to pay the amount of the decree with interest. Neither the *havdla* nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed. The plaintiff now sued to recover the debt due under the bond. The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void. On reference to the High Court,

Held, that the whole bond was void. The *havdla* was an agreement such as is contemplated in paragraph 1 of section 257A of the Civil Procedure Code (Act XIV of 1882), and was void for want of sanction of the Court under that section. The bond, regarded as one in consideration of the *havdla* or as an agreement for satisfaction of the decree, was also void under paragraph 2 of the same section for a similar reason.

THIS was a reference by H. Batty, District Judge of Thána, under section 617 of the Civil Procedure Code (Act XIV) of 1882.

* Civil Reference, No. 45 of 1887.

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The plaintiff obtained a money decree against the defendant Hur Patel, and, in execution thereof, attached his property. Thereupon, at Hur Patel's request, five persons gave a *havála* or oral undertaking to pay the amount of the decree, and the attachment was removed. It appeared that some payment was made under the *havála*. Subsequently Hur Patel and the defendants Nos. 2 and 3 executed a bond to the plaintiff reciting the *havála*, and the payment thereunder, and agreeing to pay the amount of the decree with interest. Neither the *havála* nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed. The plaintiff now sued to recover the debt due under the bond. The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void.

The points submitted by the District Judge for the High Court's decision were :—

1. Is an agreement void under section 257A if entered into by a judgment-debtor and others with a decree-holder to pay the amount of an *havála* given in settlement of a decree with interest not awarded by the decree, if at the time of such agreement in substitution of the *havála* the decree was still enforceable and was not certified as satisfied ?

2. If the agreement to pay interest in excess of the decree be void, is the agreement valid and enforceable as far as regards the amount due under the decree ?

On the first point the District Judge was of opinion that the agreement was void under section 257A so far as regards the interest not due under the decree ; on the second, that the agreement is not void in respect of the principal due under the decree.

Vásudev Gopál Bhandárkar for the plaintiff :—The first defendant was not a party to the *havála*, though it was given at his request by others. The defendant was a party to the bond, and if the bond is void as against him it is not so as against the other defendants. The bond is not entirely void. The agreement for payment of interest can be separated from the other part, and

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the other defendants are liable to pay the principal amount of the decree: see *Davlatsing* v. *Pándu*[1]. The provisions of section 257A (Act XIV of 1882) applying only to parties to the decree, and here the other defendants not being parties are liable to pay: see *Yellá Chetti* v. *Mualsámi*[2].

Shivrám Vithal Bhandárkar for the defendants:—The whole bond is void, as the two parts cannot be separated. *Davlatsing* v. *Pándu*[1] is on all fours with the present case. If the *havála* is void, for want of Court's sanction under section 257A of the Civil Procedure Code, the bond, which was based on it, is also void.

NÁNÁBHÁI HARIDÁS, J.:—The *havála* mentioned by the District Judge was an agreement such as is contemplated in paragraph 1, section 257A, Civil Procedure Code, and, as such, void on account of want of sanction by the Court which had passed the decree.

If the bond sued upon be regarded as one in consideration of the *havála*, there was no consideration for it; the *havála* itself was void for the reason above mentioned.

If it be regarded as an agreement for the satisfaction of the decree, it comes under paragraph 2, Section 257A of the Code, and is void for want of the Court's sanction.

For these reasons, we consider the whole bond to be void.

(1) I. L. R., 9 Bom., 176. (2) I. L. R., 6 Mad., 101.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1888.

March 1.

JUGALDA'S, (ORIGINAL DEFENDANT), APPELLANT, *v.* AMBA'SHANKAR AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Sale by landlord of land held by tenant—Fraud in such sale—Suit by purchaser against tenant—Plea by tenant impeaching sale by his landlord —Limitation.

The defendant was tenant of the lands in dispute under a lease dated 22nd June, 1875. In 1878 his landlord sold the lands to the plaintiffs by registered deed, but in 1879 complained to the Mámlatdár that he had been cheated by the plaintiffs, who, he alleged, had not paid the purchase-money. This allegation the plaintiffs denied.

* Second Appeal, No. 748 of 1885.

1883.

JUGALDA'S v. A'MBA'-SHANKAR.

In September, 1881, the defendant brought a suit against the plaintiffs, in which he prayed for a declaration that the sale of the land to the plaintiffs was fraudulent, and that no consideration had been paid. This suit, however, was withdrawn by the defendant on the 15th November, 1881, with leave to bring a fresh suit, but no fresh suit was brought by him within three years from November, 1881, nor was any suit brought by the plaintiffs' vendors to set aside their sale to the plaintiffs.

In 1883 the plaintiffs brought this suit against the defendant, to recover Rs. 960 as arrears of rent for four years for the lands described in their plaint. They alleged that the lands in question had been sold to them on the 12th September, 1878, and that the lands mentioned in their plaint had been leased on the 22nd June, 1875, to the defendant by their (the plaintiffs') vendors, and that in that lease the defendant had contracted to pay Rs. 240 annually. The defendant in his defence again raised the question whether the sale to the plaintiffs was not fraudulent and without consideration.

Held, that the right of the defendant to plead as a defence to this suit, that the plaintiffs' purchase of the 12th September was fraudulent and void, was barred. As a tenant he had no independent right to impeach the sale by his own landlords. He could only do so with their consent, assuming it to be still open to them to impeach it. But their complaint to the Mámlatdár in 1879 showed that they were then acquainted with the facts which entitled them to set aside the sale, and by the end of 1882, at the latest, their right to file a suit for that purpose was, therefore, barred. Their right to impeach the sale by suit being thus barred, their tenant (the defendant) could not be allowed to impeach it as a defence to an action by the plaintiffs.

THIS was a second appeal from a decision of W. H. Horsley, Acting Assistant Judge of Broach.

The defendant was tenant of the lands in dispute under a lease dated 22nd June, 1875. In 1878 his landlord sold the lands to the plaintiffs by registered deed, but in 1879 complained to the Mámlatdár that he had been cheated by the plaintiffs, who, he alleged, had not paid the purchase-money. This allegation the plaintiffs denied.

In September, 1881, the defendant brought a suit against the plaintiffs, in which he prayed for a declaration that the sale of the land to the plaintiffs was fraudulent, and that no consideration had been paid. This suit, however, was withdrawn by the defendant on the 15th November, 1881, with leave to bring a fresh suit, but no fresh suit was brought by him within three years from November, 1881, nor was any suit brought by the plaintiffs' vendors to set aside their sale to the plaintiffs.

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In 1883 the plaintiffs brought this suit against the defendant to recover Rs. 960 as arrears of rent for four years for the lands described in the plaint, alleging that the said lands with other land had been sold to them on the 12th September, 1878; that the lands mentioned in the plaint had been leased on the 22nd June, 1875, to the defendant by their (the plaintiffs') vendors, and in that lease the defendant had contracted to pay Rs. 240 annually. The defendant in his defence again raised the question, whether the sale to the plaintiff was not fraudulent and without consideration. Some members of the family of the plaintiffs' vendors applied to be made co-defendants. The Court of first instance, however, rejected their application, and awarded the plaintiffs' claim.

The defendant appealed to the Assistant Judge, who varied the decree of the lower Court with the following remarks:—

"* * * When the plaintiffs bring this suit for the rent in 1883, the defendant returns to his allegation that the sale-deed is fraudulent and without consideration, and certain members of the vendor's family apply to be made defendants, in order that as defendants they may raise an issue which they could not raise as plaintiffs. It appears to me that they are estopped from so doing. They have by their omission to sue intentionally permitted the plaintiffs to believe their sale to be admittedly true, and to sue for rent thereon, and they cannot now be allowed to deny the truth of the sale-deed. The suit between them and the plaintiffs to set aside the deed of sale is barred by limitation * * * *. They have allowed the period within which they could do so to go by. The defendant, as the tenant of the plaintiffs' vendors, cannot deny their title, or that of the plaintiffs derived from them, and it is, therefore, unnecessary to go into the second point * * *. I amend the decree of the Subordinate Judge and award the plaintiffs Rs. 720 as rent for three years * * *".

From this decision the defendant preferred a second appeal to the High Court.

Gokuldás Kahándás for the defendant:—The right of the defendant to impeach the purchase of the plaintiffs as fraudulent is not barred. His possession was prior to plaintiffs' purchase and

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not under a subsequent agreement. The withdrawal of the suit does not operate as an estoppel—*Raghubár Dayál* v. *Bhikya Lál* (1).

Múnekshá Jehángirshá for the plaintiffs:—The defendant's lessors became aware of the fraud in 1879 when they complained to the Mámlatdár, and at the latest they could sue to set aside their deed of sale in 1882. Their right to sue having lapsed, neither they nor the defendant, who is their tenant, can impeach the sale. Moreover, the defendant withdrew his former suit to have the sale declared fraudulent. He cannot now impeach the deed.

SARGENT, C. J.:—We have already decided that no case of estoppel arises on the evidence against the defendant; but the important question still remains, whether the defendant was debarred by the Limitation Act from pleading that the plaintiffs' purchase of 12th September, 1878, was null and void for want of consideration and on the ground of fraud. As defendant was admittedly the tenant of the Ratansang Gokáji family, of whom the plaintiffs' vendors were members, he had no independent right to impeach the sale by his own landlords, and could only do so with their consent, assuming it to be still open to the latter to impeach it, It is not disputed that he has such consent; and the question, therefore, for consideration is, whether the plaintiffs' vendors could now impeach their own sale-deed.

It has been found by the Assistant Judge that as early as 1879 the vendors complained before the Mámlatdár that they had been cheated and had not received consideration, and it may, therefore, be assumed that they were then acquainted with all the facts entitling them to set aside the sale. By the end of 1882, at the latest, their right to file a suit for that purpose would, therefore, have been barred. The circumstance that they were in possession through their tenants could not affect the application of the Act. They would be equally bound to take proceedings to set aside the sale-deed within the time limited by the Act. Their right to impeach the sale by suit was, therefore, barred, and under these circumstances we do not think their tenant can be allowed to plead the invalidity of the sale in defence to an action to recover possession from him.

(1) I. L. R., 12 Calc., 69.

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JUGALDA'S v. A'MBA'-SHANKAR.

We must, therefore, reverse the decree of the Court below, and send back the case for a decision on the merits, having regard to the issues in the Court below other than No. 1. Costs to abide the result.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1888.
March 6.

BA'I NARMA'DA, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHAGWANTRA'I AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mayukha—Stridhan—Inheritance—Property given to a woman by a stranger—Devolution of such property—Daughter's daughters not entitled to it—Son's widow preferred as gotrája sapinda.

By the law of inheritance laid down in the Mayukha, a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter.

THIS was a second appeal from a decision of W. H. Horsley, Acting Assistant Judge at Broach, confirming the decree of Ráv Sáheb Chandulál M., Subordinate Judge at the same place. In 1881 one Rájkore, the widow of one Keshavrám, died at Broach possessed of a house, which had been given to her by a *yajmán*, and of a sum of money deposited in the Savings Bank consisting of fees which had been paid to her by *yajmáns*. Her son Dhaneshwar married the plaintiff Bái Narmáda, and died two years after his marriage. Her daughter Rewá was married to the defendant Bhagwantrái. Rewá predeceased her mother Rájkore, who died, as above stated, in 1881. On her death the defendant Bhagwantrái, (her son-in-law), took possession of the house, and withdrew the money from the Savings Bank, apparently on behalf of his minor daughters.

In 1883 the plaintiff Bái Narmáda, (the daughter-in-law of Rájkore), sued the defendant to recover possession of the house and the money.

* Second Appeal, No. 747 of 1885.

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The defendant contended *(inter alia)* that the house and the money belonged to Rájkore as her *stridhan*, and that his daughters were entitled to this property in right of their mother Rewá, who was Rájkore's daughter, that he had expended money on the funeral expenses of Rájkore, and that at Rájkore's request he had paid the debts of her son Dhaneshwar.

Both the lower Courts held the property in dispute to be the *stridhan* of Rájkore, and rejected the plaintiff's claim.

The plaintiff preferred a second appeal to the High Court.

Gokuldás Kahándás for the appellant:—The property left by Rájkore was not her *stridhan* proper, and did not devolve upon her daughters. The house was given to her by a stranger to the family. The law of Mayukha governs the case, as it is from Gujarát, and according to that law the property vests in the plaintiff as *gotrájá sapinda* of Rájkore: see *Vithaldás Mánickdás* v. *Jeshubái*[1].

Nagindás Tulsidás for the respondents:—The house here was a gift to Rájkore, and she took it absolutely as her *stridhan*. Her earnings invested in the bank were also her *stridhan*. The property left by Rájkore falls within one of the six classes of *stridhan:* see Mayne's Hindu Law, para. 288 This is her separate acquisition, and comes within the term "any other acquisition" under the Mayukha, pl. 2 and 3. The daughter's daughters are, therefore, the persons to succeed to it. The defendant Bhagwantrái has paid Rájkore's funeral expenses, and has also paid the debts of the plaintiff's husband, and is entitled to be recouped if the plaintiff is held entitled to the house and the money.

SARGENT, C. J.:—It has been found by the Assistant Judge that the house in question was given to Rájkore by a stranger to the family; and that the moneys invested in the Government Savings' Bank were earned by Rájkore herself. The law of inheritance as laid down in the Mayukha, (which would determine the course of inheritance in this case), prescribes that the devolution of such property should be as if Rajkore had been a male; it would, therefore, vest in the plaintiff as the nearest *gotrája sapinda* —*Vithaldás Mánickdás* v. *Jeshubái*[1]. It is clear, however, and

(1) I. L. R., 4 Bom., 219

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indeed was not disputed, that it would be contrary to equity and good conscience to allow her to recover the property from defendant No. 1 without permitting him to recoup himself out of it as to such moneys as he had expended either on Rájkore's funeral expenses or had paid at her desire to discharge the debts of her son Dhaneshwar. As the Assistant Judge has not recorded a finding on the fourth and fifth points raised by him, we must send down the case for a finding on the following issues :—

1. Did defendant No. 1 pay Rs. 269-6-6, or any and what sum for Rájkore's funeral expenses ?

2. Did defendant No. 1 pay sums amounting with interest to Rs. 1,054, or any and what sum, in satisfaction of Dhaneshwar's creditors ?

3. Was such last payment made at Rájkore's desire ?

Findings to be sent to this Court within two months of the date of this order.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

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April 16 & 17.

KESSOWJI DA'MODAR JAIRA'M, (PLAINTIFF), *v.* KHIMJI JAIRA'M, (DEFENDANT).*

Jurisdiction—High Court of Bombay, jurisdiction of—Letters Patent, 1865, *Cl.* 12 *—Persons not British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—Cause of action arising wholly outside the jurisdiction.*

In clause 12 of the Letters Patent, 1865, of the Bombay High Court the words "If the defendant...shall ..carry on business" must be interpreted to mean "if the defendant *being a British subject*...shall...carry on business", and where the liability of a foreigner is in question, the "carrying on business" must include actual residence.

The scope and object of clause 12 of the Letters Patent was to define the jurisdiction of the Municipal Courts of India. It must, therefore, be read by the light of the general principles of municipal jurisdiction, save so far as it expressly derogates from those general principles. All legislation is *primâ facie* territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign.

* Suit No. 239 of 1886.

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Every statute is to be interpreted and applied, so far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law.

A person not a British subject resident out of the jurisdiction, but carrying on a branch business in Bombay through an agent, is not liable to be sued in the High Court of Bombay where the cause of action has arisen wholly outside the jurisdiction.

Semble—The High Court has jurisdiction in such cases where the defendant is a British subject: see *Chinnammal* v. *Tulukannammal*(1).

THE plaintiff in this suit was a resident in Bombay. The defendant, who was the plaintiff's paternal uncle, resided at Cutch, but carried on business in Bombay, under the name of Jairám Sewji, by means of his *munim*. Both parties were subjects of the Ráo of Cutch.

The plaintiff stated that Jairám Sewji, his grandfather, (the father of the defendant), had established and carried on an extensive business at Bombay, Cutch, and Zanzibar, under the name of Jairám Sewji. He died in 1866, leaving two sons, *viz.*, Dámodar Jairám, (father of the plaintiff,) and the defendant Khimji Jairám, who was then only ten years old; and after his death the business was carried on by his eldest son Dámodar. In the year 1871 Dámodar died, leaving the plaintiff, his only son, who was then three years old. From that time until the year 1876 the business was carried on by *munims*; but in 1876 the defendant Khimji Jairám, who had some time previously attained his majority, took charge of the business at Zanzibar, and at the same time negotiations were begun with a view to winding up the business at Bombay and Cutch. In the negotiations, Ládkávahu, the mother of the plaintiff, acted for him, he being then a minor. An arrangement was ultimately made between the parties, and the assets of the firm at Bombay and Cutch were duly divided in 1878.

It was intended and desired by the defendant and Ládkávahu, on the plaintiff's behalf, to wind up and divide between the plaintiff and the defendant the assets of the business at Zanzibar also, and on the 19th May, 1881, terms of arrangement were agreed on by the defendant and Ládkávahu, the material part of which

(1) 3 Mad., H. C. Rep., 146.

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was that a lump sum of 2,25,000 dollars was to be paid to the plaintiff as his share, and that in consideration thereof he should release all the claims to the said Zanzibar business and the assets thereof, and give over the same to the defendant absolutely. This money was duly paid to Ládkávahu, and the release was executed.

On the 3rd September, 1885, the plaintiff attained majority, and after making enquiries satisfied himself that the arrangement made by his mother on his behalf was disadvantageous to him, and that a very much larger sum ought to have been paid to him as his share in the Zanzibar business. He, therefore, filed this suit, praying that the above arrangement and release should be set aside; that the accounts should be taken, &c.

The defendant filed a written statement, of which the only portion material to this report is the following:—"The defendant says that the property, the subject-matter of this suit, is situate in the foreign territory of Zanzibar; that the defendant and the plaintiff are subjects of His Highness the Ráo of Cutch; and that the release, which the plaintiff seeks to set aside, was executed at Wadhwán, in accordance with an award made in Cutch, and the defendant does not reside in Bombay, nor is his principal place of business there. He submits that under these circumstances leave to file this suit under clause 12 of the Letters Patent of this Honourable Court was improperly granted to the plaintiff, and that this Honourable Court has no jurisdiction to hear and determine this suit."

The suit now came on for the determination of the preliminary issue raised upon the above clause of the written statement, *viz.*, whether this Court had jurisdiction to try the suit.

It was admitted by the plaintiff, that the defendant was a subject of the Ráo of Cutch, and that no part of the cause of action arose in Bombay.

It was admitted by the defendant that he carried on business in Bombay through agents, he himself being a resident at Cutch. The defendant also admitted that he possessed some landed property within the jurisdiction of the Court.

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Lang and *Jardine* appeared for the plaintiff.

Latham (Advocate-General), *Farran*, and *Inverarity* appeared for the defendant.

Latham:—The question is, whether this Court has jurisdiction over foreigners residing abroad, but carrying on business in Bombay, when no part of the cause of action has arisen in Bombay. The defendant is not a British subject, but a subject of the Ráo of Cutch. He does not reside within the jurisdiction, although he has property within its limits; but he carries on business in Bombay by his agents. He does not personally carry on this business. In this case, moreover, the cause of action is not in any way connected with this business, and no part of it has arisen in Bombay. We submit that under these circumstances this Court has no jurisdiction.

We contend that the expression "carry on business" in clause 12 of the Letters Patent implies a personal attendance to the business carried on. That was the carrying on of business which was to be sufficient under the Letters Patent to give jurisdiction. We admit that this point seems to have been decided adversely to us by Sargent, J., in *Harivallabhdás Kalliándás* v. *Utamchand Mánikchand*[1]; see also *Mutháya Chetti* v. *Allan*[2], but the question does not seem to have been discussed However, these decisions are against us with reference to the meaning of that expression, and we are bound by them, unless reversed by the Court of Appeal.

But we contend that the carrying on of business, which is to give jurisdiction, must be by a defendant who is a British subject or a foreigner resident within British dominions. The words "being a subject or a foreign resident" must be read into clause 12 after the word defendant. This must be the intention of the clause; except by express words, no Court could be held to have jurisdiction over foreigners resident abroad. Such a jurisdiction cannot be implied. This Court has no such personal jurisdiction. Of course, if by express words such a jurisdiction was given, the Court would be bound to exercise it, but that would be a breach

(1) 8 Bom. H. C. Rep., O. C. J., 236. (2) I. L. R., 4 Mad., 209.

of international law, and a judgment in exercise of such jurisdiction would be a nullity outside British India: see Maxwell on Statutes, (2nd ed.), Ch. 6.

In construing statutes there is always a presumption that they do not extend the jurisdiction beyond the dominion. There are, no doubt, exceptions, but they apply only to British subjects—Maxwell, (2nd ed.), Ch. 6; section 1, p. 168. Again, there is always a presumption against any violation of international law being intended—Maxwell, pp. 173—176. In *Niboyet* v. *Niboyet*[1], James, L. J., says: "Of course it is always to be understood and implied that the legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state." The decision there was that the English Divorce Court had jurisdiction over a foreigner resident, though not domiciled. We do not deny that if the defendant in this case resided in Bombay, this Court would have jurisdiction: see also *Firebrace* v. *Firebrace*[2]; see Maxwell on Statutes, Ch. VI, section 3, page 181 (2nd ed.), as to the construction of statutes conferring rights which affect foreigners. *Jefferys* v. *Boosey*[3] decides that a statute cannot confer any right or privilege on a foreigner resident abroad without express words. *A fortiori* it would seem that a burden or liability cannot be imposed without express words. Lord Cranworth (p. 954) was of opinion that the word "author" in an English statute must be held to refer only to British authors: see also Lord St. Leonards' opinion (p. 980). So we contend that the word "defendant" in clause 12 means British defendant. A foreigner, no doubt, may sue in our Courts, but in doing so he submits to the *lex fori* and must conform to the procedure—*Lopez* v. *Burslem*[4]; *Cope* v. *Doherty*[5].

A strict construction is applied to acts creating or delegating jurisdiction—Maxwell on Statutes, (2nd ed.), p. 357. The Letters Patent come within that class: see *Cookney* v. *Anderson*[6]; see

(1) L. R., 4 Prob. Div., 1 at p. 7.
(2) L. R., 4 Prob. Div., 63.
(3) 4 H. L. C., 815, at p. 895.
(4) 4 Moore's P. C., 300-305.
(5) 4, K. & J., 309, S. C. on Appeal; 2 De G. & J., 614.
(6) 1 De G. J. & S., 365.

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also Foote's Private International Jurisprudence, p. 250 *et seq.* There must be a cause of action arising within the jurisdiction; otherwise a plaintiff must go to the Court of the defendant—*Matthæi* v. *Galitzin*[1]; *Davis* v. *Park*[2].

The English Judicature Acts do not give the English Courts the wide jurisdiction which is claimed for this Court in the present case. A suit such as this could not be tried in the English Courts: see Supreme Court Rules, Order XI. That order is exhaustive, and all cases must fall within some class mentioned there—*Eager* v. *Johnstone*[3]. The Courts at home have a discretion—*Société Générale de Paris* v. *Dreyfus*[4]; but there is no discretion given to the Courts in India; therefore the clause must be construed strictly as to foreigners and the power of summoning them. In *Whaley* v. *Busfield*[5] the power to serve a summons was held not to extend to an originating summons: see also *In re Anglo-African Steam Ship Company*[6], and in commercial matters *The Queen* v. *Keyn*[7].

If this Court has a personal jurisdiction over non-resident foreigners by reason merely of their carrying on a business here through agents, it is bound to exercise it so that a suit may be brought here against any such person, although he may reside in New York or Paris and although the whole cause of action has arisen there. This would be a most abnormal personal jurisdiction—*Reg* v. *Lewis*[8]; Story's Conflict of Laws, sec. 539 *et seq.* It is here pointed out that attachment of property does not give jurisdiction over the person. *A fortiori* the mere existence of property within the jurisdiction does not.

The case of *Ex parte Blain*[9] is very analogous to the present case. There the Court held it had no jurisdiction over a foreigner, although the act of bankruptcy was committed in England. We submit, on the authority of the above cases, that this Court has no jurisdiction.

(1) L. R., 18 Eq., 340.
(2) L. R., 8 Ch. 862 (note).
(3) 22 Ch. Div., 86.
(4) 29 Ch. Div., 239.
(5) 32 Ch. Div., 123
(6) 32 Ch. Div., 348.
(7) 2 Ex. Div., 63.
(8) Dears & Bell C.C., 182.
(9) 12 Ch. Div., 522.

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Jardine :—We must take clause 12 of the Letters Patent as we find it. This Court cannot insert words to limit the meaning of the expression actually used. The only case directly in point is in our favour, *viz.*, *Harivallabhdás Klliándas* v. *Utamchand Mánikchand*[1]. That was a decision upon this very clause, while all the cases that have been cited are decisions on English statutes. It is possible that the Legislature may have intended to confer on the Courts here a different measure of jurisdiction from that exercised in England. The circumstances here are completely different. The foreign countries present to the mind of the English Legislature in framing their statutes and of the English Judges in construing them are civilized countries such as France, Germany, &c., all of which possess systems of law and elaborate legal machinery. An Englishman can sue a Frenchman in France and get judgment there, and then sue in England on the foreign judgment, and thus make the defendant's property in England available to satisfy his claim. But the situation in India is entirely different. We are surrounded by Native States, with rude systems of law and imperfect judicatures, the decrees of which English Courts cannot recognise or enforce—*Bhavánishankar Shevakrám* v. *Pursadri Kálidás*[2] and *Himmatlál* v. *Shivdjirávi*[3]. If we get a decree in this case in Cutch against the defendant we could not execute it against his property in Bombay. The presidency towns in India are full of foreigners carrying on business as agents for the principals who reside in these Native States. How are these principals to be reached if this Court has no jurisdiction? This was the question for the Legislature. Obviously, the principle of the "comity of nations" cannot apply to such conditions, and no arguments or authorities based on international law are in point. The Letters Patent in view of these circumstances recognised constructive residence as giving jurisdiction. The jurisdiction is expressly given by the clause over those who "carry on business", and this Court cannot take it away. Our case is that any foreigner carrying on business in Bombay is an inhabitant of Bombay and is within the jurisdiction according to clause 12

(1) 8 Bom. H. C. Rep., 236, O. C. J. (2) I. L. R., 6 Bom., 292.
(3) I. L. R., 8 Bom., 593.

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of the Letters Patent—*In re Hurruck Chund Golicha*[1]. Counsel commented upon the English authorities cited by the other side, and contended that they were not applicable to India.

SCOTT, J.:—This is a preliminary issue of great importance. It raises the question whether subjects of the Native States of India resident out of the jurisdiction but with a branch business in Bombay, are liable to be sued in this High Court when the cause of action arose entirely out of the jurisdiction. The subjects of the Native States of India are foreigners in the sense required here, just as much as say the natives of France. They have their own courts, their own jurisprudence, their own procedure and the criminal and civil jurisdiction of the Courts of British India is by treaty excluded from them. A decision in favour of jurisdiction might have curious consequences. If, for instance, a native of France entered into a contract with a French architect for building a house in Paris on certain terms and conditions, the tribunals of this city would be competent to hear a suit brought by one of those parties against the other on a breach of the contract, provided the defendant carried on business through an agent in Bombay. Or, to come nearer home, subjects of the Nizám, resident in the Nizám's territory, would be able to sue each other in this High Court for breaches of contracts made, and to be carried out in that territory, provided that the defendant carried on a branch business by means of an agent in Bombay. Still, my duty is only to administer the law as it stands—"*jus dare non jus dicere*"

The facts of the particular case are as follows:—The parties are natives of Cutch—not British subjects, but subjects of the Ráo of Cutch. The plaintiff, lately come of age, asks for a release of the 19th May, 1881, to be set aside, which was made during his minority concerning a family partnership carried on in Zanzibar, and concerning certain family property in Cutch. The release was passed at Wadhwán. Thus the contract, which is the cause of action, was made and the subject-matter of the suit is situated entirely outside the jurisdiction of this Court It is admitted, however, that the defendant possesses

(1) I L R., 5 Calc., 605

some property in Bombay, and carries on a branch business through an agent here. But the cause of action is wholly independent of that business.

It is important to note that since the Order in Council relating to Zanzibar passed in 1884, suits between British protected subjects then (such as subjects of Cutch) are heard before the Consular Court there, with an appeal to the appellate side of this High Court. Thus the parties have a *forum* in Zanzibar. They have another *forum* in Cutch, and it is worth noting that a recent Act of the Government of India (Act VII of 1888) gives to judgments of Native States of India some of the force, though not all the force, accorded to foreign judgments generally by the Code of Civil Procedure.

The question, of course, depends entirely on the terms of section 12 of the Letters Patent, by which the original civil jurisdiction of this High Court is defined. The earlier portion of the section does not require consideration, as it is admitted that the cause of action arose wholly without the jurisdiction, and that the defendant did not dwell or personally carry on business for gain within the limits. Therefore, the precise words of the Letters Patent requiring interpretation are "the said High Courts shall be empowered to receive, try and determine suits * * * if the defendant at the time of the commencement of the suit, shall * * * carry on business * * * within such limits." What, then, is the meaning of the term 'defendant'? What is the meaning of the term 'carry on business?' I have had the advantage of most able arguments from the Advocate-General and Mr. Farran on the one side and from Mr. Jardine on the other, and they furnished me with many authorities that bear upon the point.

The defendant's argument against the jurisdiction is twofold: 1st, that the carrying on of business must be a personal carrying on, and not a carrying on through an agent; and 2ndly, that the 'defendant' mentioned in the section must be held to mean British subject and not a foreign 'defendant'. As regards the first objection, I am bound by authority. As a Judge of the first instance I must follow the decision of various High Courts of India, and

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hold that 'a carrying on of business through an agent' satisfies the section—*Chinnammál* v. *Tulukannatamma*l(1); *Muthaya Chetti* v. *Allan*(2). The second point is one of much greater difficulty. Mr. Jardine relied upon a *dictum* of the present Chief Justice in *Harivallabhdás Kalliándás* v. *Utamchand Mánikchand*(3), that an inhabitant of Baroda was constructively an inhabitant of Bombay, because he carried on banking business here by a *munim*, and as such was subject to the orders and process of the High Court in the exercise of its equity jurisdiction. This *dictum* is quoted in the head-note of the case as a decision. But a careful reading of the facts of the case and the judgment shows that it was only a *dictum*. The application before the Court was to order Gopálráv Myrál, inhabitant of Baroda, to deliver up certain jewels in his possession to certain sequestrators named by the Court. The decision of the Judge was that "such an order, although not in terms, would be virtually an interference with the rights of a sovereign independent prince the Gáikwád * * * and would provoke a most inconvenient conflict of authority. * * * It was incumbent on the plaintiff to present such a case to the Court as would leave no doubt either as to jurisdiction or even conflict of authority. * * * * Under the present circumstances I must discharge the rule."

No doubt the learned Judge did say in an earlier portion of his judgment (p. 240) "it was admitted that Gopálráv Myrál resides at Baroda, but that he carries on the business of a banker both here and at Baroda—at the former place by means of his *munim*, Vishnu Trimbak, under the name of Gopálráv Myrál. There can be no doubt, therefore, that he would be liable to be made a defendant to a suit in this Court under section 12 of the Letters Patent of the High Court." This strong expression of opinion from such a distinguished legal authority as that of the present Chief Justice would ordinarily lead me at once to follow him. But it is quite clear that the important point which has, in the present case, been so fully and ably argued before me, *viz.* the point that section 12 cannot have

(1) 3 Mad. H. C. Rep., 146. (2) I. L. R., 4 Mad., 200.
(3) 8 Bom. H. C. Rep., O. C. J., 236, at p. 243.

been intended to include foreigners in cases where they are themselves beyond the jurisdiction, and the cause of action arose wholly outside it, was not discussed. As, therefore, the *dictum* cited was not strictly necessary to the decision of the particular point at issue then before the Court, and as a new line of argument has now been developed before me, which was not presented in the previous case, and might have altered the learned Judge's opinion, I think I am at liberty to consider the question as of first impression and for the first time presented for judicial decision.

The cases in the Indian Reports on this question are few, and I can find none which interprets section 12 of the Letters Patent on this point of jurisdiction over non-resident foreigners in suits where the cause of action arose wholly outside the territorial limits.

The following passage from a carefully considered judgment of Bayley, J., in *Khimji Chaturbhuj* v. *Sir Charles Forbes, Bart.*(1), seems to me to have a material bearing upon the point:—

"The plaintiffs' contention as to the proper construction to be placed upon Cl. 12 of the Letters Patent certainly derives no countenance from the opinion expressed by Her Majesty's Secretary of State for India in the letter dated 14th May 1862 to the Governor General of India in Council accompanying the original Letters Patent of the High Court to be established in Bengal, a letter which was printed in 1862 with the Act of Parliament and the Letters Patent of the High Court of Bombay in the little book containing the Rules of the Bombay High Court. In para. 16 of that letter, Sir Charles Wood said: 'As it is very desirable that every suit should be instituted in the court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division

(1) 8 Bom. H. C. Rep., at pp. 113, 114, O. C. J.

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subject to the authority of the High Court, has not been vested in the High Court.' And at para. 20 he said: 'As already observed, the effect of Cl. 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the civil jurisdiction exercised by the Supreme Court.' This letter, of course, affords no assistance in the interpretation to be put upon Cl. 12 of the Letters Patent, and I merely notice it to show that the framer of the Letters Patent of 1862 stated he had no intention of extending, or of even continuing, the old Supreme Court jurisdiction by way of constructive inhabitancy or residence."

The analogous principle, that the Municipal Courts of India have no jurisdiction over foreign criminals in cases where the offence has been committed by a foreigner in a foreign State, such as the Native State of Kolhápur, has been distinctly settled—*Reg.* v. *Pirtái*[1]. But for the settlement of this particular question of civil jurisdiction it is necessary to turn to general principles and to English decisions.

The English law is laid down in the Judicature Act Order XI. It must, however, be first stated that the jurisdiction given by the Judicature Act does not correspond exactly to that given by the Letters Patent. The Judicature Act is limited by sections 1 and 2 of Order XI, where the defendant is out of the jurisdiction, to cases where (*a*) the whole or part of the subject-matter is within the jurisdiction, or (*b*) where the contract in question was made or broken within the jurisdiction, or (*c*) where the act or thing in dispute was done or is situate within the jurisdiction. The words "or if the defendant at the time of the commencement of the suit shall carry on business" do not occur in the Judicature Act, as they do in the Letters Patent. It seems to me clear the suit would not lie in an English Court.

But do the words just cited from the Letters Patent bring it within the jurisdiction of an Indian Court? That depends on whether the word 'defendant' in connection with the carrying on business must necessarily have been confined to British subjects. It certainly could not have been intended to be confined to British

(1) 10 Bom. H. C. Rep., 356.

subjects so far as the *dwelling* or *personally* working for gain within the jurisdiction is concerned. Foreigners resident within our territory are undoubtedly subject to our jurisdiction. Do foreigners resident outside the jurisdiction, but carrying on trade within it, stand on a different footing? The jurisdiction of this High Court is carefully defined and limited by statute. The Letters Patent were issued in pursuance of powers given by 24 & 25 Vic. c. 104, the Act for establishing High Courts of judicature in India, and those Courts were to have all the jurisdiction in the presidency for which they were respectively established, that Her Majesty should by Letters Patent grant. It is quite clear from this that the Bombay High Court was only invested with jurisdiction in *British India*, saving certain exceptions to be declared by the Governor General. It must also be noted that it was laid down by Green, J., (confirmed in appeal by the present and late Chief Justice), that there is no presumption in favour of jurisdiction in the Courts of India beyond what is expressly conferred by the Charters of constitution (12 Bom. H. C. Rep., 113, at p. 121, affirmed I. L. R., 1 Bom., 23). If we read the Letters Patent by the light of the charter of the Supreme Court, which defined the jurisdiction before the Letters Patent were issued and the High Court created, we find the authority of the Court strictly limited to British subjects and to inhabitants of the Presidency of Bombay. But the Courts which preceded the High Courts had stretched the meaning of the word "inhabitants" so as to cover cases of what was called constructive residence, where defendants carried on trade by means of agents. (See the case in Morley's Digest, Vol. II, 66, decided by Sir F. H. East.) Bayley, J., in the case already cited shows that this doctrine of constructive residence was not intended to have legislative sanction in the High Courts. Moreover, none of those older cases extended that principle, in terms, to residence in Native States, which obviously stand on a different footing as regards the execution of decrees.

Now to return to the present case. The Native States are foreign territory beyond our jurisdiction, and the inhabitants of Native States, such as Cutch, apart from the above-

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named exceptions, are foreigners. Can one native of Cutch, under these circumstances, sue another native of Cutch in this Court, when the cause of action arose and the subject-matter of the suit is wholly outside the limits of the jurisdiction, merely because the defendant has some property, and carries on some business here through an agent? The Court, under such circumstances, would, according to decisions I am bound to follow, have jurisdiction under the Letters Patent, if he were a British subject. Does the fact of the defendant being a foreigner take away that jurisdiction? No doubt the ordinary rule is that the jurisdiction of Municipal Courts is limited and territorial, and does not go beyond those limits within which the compulsory process of the Court will operate to compel obedience to its orders and decrees. This rule is founded on international comity, and in the absence of express words it governs the general words of Acts of Parliament. * * * Maxwell, (Interpretation of Statutes, Ch. VI, p. 119) says: "Primarily, the legislation of a country is territorial," and the presumption in the absence of express words is that Acts of Parliament do not operate on the subjects of the enacting State beyond the territorial limits of that State, and *a fortiori* does not operate on foreigners beyond those limits. And again he says: (p. 123) "It is an admitted principle of public law, that ... a nation has no jurisdiction over offences committed by foreigners out of its territory," and every statute must be interpreted as not to be inconsistent with that established rule. But, as the same author points out, if the language of the Act expressly applies to foreigners abroad, the Court must obey and administer it as it stands.

Now does this clause 12, as judicially interpreted by the Courts of India, bring all persons carrying on trade by an agent within the jurisdiction into the same category as those who dwell or personally work for gain—two classes over whom there is certainly jurisdiction whatever may be their nationality? Or does it, even when so widely interpreted, still stop short of non-resident foreigners? The scope and object of the clause was, no doubt, to define the jurisdiction of the Municipal Courts of India. It must, therefore, be read by the light of the general principles of municipal jurisdiction, save so far as it expressly

derogates from those general principles. I have already stated these general principles, but they are still more completely set out in the following passage from Story's Conflict of Law:—"No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals (sec. 539)." Of course the case is changed if the foreigner defendant is within the jurisdiction. A jurisdiction *in personam* is immediately created, and effect would be given to the Court's decree by a coercion to be exercised within its own jurisdiction—*Penn* v. *Lord Baltimore*(1). The jurisdiction of the sovereignty over citizens within the territory is complete, and over foreigners whilst resident within the territory is complete (Story, sec. 541); and "if the Court had acquired jurisdiction of the person by his being within the State, the Court will compel him, by attachment, to do his duty under his contract or trust." (Kent. Com., Vol. 3, p. 463); see also Westlake Private International Law, C. 5.; and Savigny on Obligations, (secs. 28-29; §§ 371-372; Guthrie's Translation, p. 220.)

The question, then, is narrowed to whether the words "if the defendant carry on trade within the limits", as interpreted by the decisions that it is not necessary he should *personally* carry on trade, must be taken to include non-resident foreigners, who carry on trade here by an agent. None of the Indian decisions have gone so far. They have only decided the matter as regards British subjects. The question remains open as regards foreigners. But can I give the same word 'defendant' in the same sentence a double meaning, *i.e.*, a limited sense as regards jurisdiction over those who carry on trade, and a general sense inclusive of foreigners and British subjects in its application to those who personally work for gain or dwell there? I think, on the whole, I can do so. To do otherwise would be contrary to the general presumption, that the Legislature does not intend to exceed its jurisdiction; and it would be a violation of the rule that every statute is to be interpreted and applied so far as its

(1) 2 Wh. & Tu. L. Ca., 1047.

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language admits, so as not to be inconsistent with the comity of nations, or with the established rules of private international law. All general terms must be narrowed in construction to avoid any such violation. A careful consideration of *Ex parte Blain*(1), a case strongly relied upon by the Advocate-General and Mr. Farran, shows that the English Courts entirely support this view. That case decided that the general word "debtor" used in the Bankruptcy Act of 1869, *did not apply* to a foreigner resident abroad, even though he was a member of an English firm who had traded and contracted debts in England. But in *Ex parte Crispin*(2) t was decided that the same general word in the same statute did apply to a foreigner domiciled abroad if he commits an act of bankruptcy in England, although he may have left England before the petition for adjudication was presented. In the circumstances of the case the defendant was held not to come within this principle; but the principle is clearly laid down. Thus the same general word in a statute has been held to apply to foreigners in one set of circumstances and not to apply to them in another. So in the present case the word 'defendant' may include foreigners when they personally work or dwell within the jurisdiction, and yet exclude them when they are non-resident, and an attempt is made to sue them on a cause of action arising elsewhere, simply because they carry on business here through an agent.

The decisions that British subjects can be sued under such circumstances do not militate against the general principles of comity that I have cited, and, therefore, the question of non-resident foreigners may be considered independently.

In *Ex parte Blain*(3) the principles laid down by the Judges who composed the Court are so much in point that I must speak of the case more in detail. The question was whether the English Court of Bankruptcy had jurisdiction to make an adjudication of bankruptcy against a foreigner domiciled and resident abroad. It was held that, although he was a member of an English firm which had traded and contracted debts in

(1) L. R., 12 Ch. Div., 522. (2) 8 Ch. App., 374.
(3) L. R., 12 Ch. Div., 522.

England, still the Court had no jurisdiction over a foreigner who had never been in England. The Court of appeal there decided that, *primâ facie*, an English statute affects only English subjects or foreigners who come, either permanently or temporarily, within the allegiance of the British Crown. James, L. J., said: (p. 526) "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature could have ever intended to make such a man subject to particular English legislation."

Brett, L. J., said: (p. 528) "It is said that the case is literally within the words of the statute, and so, no doubt, it is. But does it follow that, because a case is literally within the words of a statute of any country, therefore it is within the jurisdiction of the Courts of that country? Certainly not. The governing principle is that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who for the time being bring themselves within the allegiance of the legislating power."

Cotton, L.J., says: (pp. 531, 532) "Let us see what the case is. We are not dealing with the question which might arise if an English Act of Parliament had expressly said that, as against a Chilian subject, or any other alien who had never been in *England*, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be, and however

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foreign nations might object, to say, this is the English statute, and we must act on it, and the question which you, a foreigner, raise we are bound to disregard. I do not say that would be so, because, if the Act had clearly gone beyond the power of the English Legislature, there might be a question. But that is not so here. All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how that word is to be limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. * * * * * * * * As regards a British subject, whether he is here or not, he can be made bankrupt if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is *primâ facie* no right to bind them if they are not here. I think, therefore, that the true interpretation of the general word "debtor" in the *Bankruptcy Act* is, a debtor subject to the English bankruptcy law"

It may be argued that bankruptcy proceedings are not a fair analogy for ordinary civil proceedings, as an act of bankruptcy must be a personal act and cannot be committed through an agent. But the principles expounded in *Ex parte Blain*[1] go beyond the bankruptcy question, and apply to all questions of jurisdiction where foreigners are concerned. Moreover, the Courts in England lay down rules quite as rigid in every kind of civil dispute. Thus in the case of *Norris* v. *Chambers* [2] Lord Campbell decided that the Court would not interfere if the subject-matter of litigation was in a foreign country, where there were Courts having the means of deciding upon and enforcing the rights of the parties. Now not only are there Native Civil Courts in Cutch, but by the treaty which the British Government concluded with the Ráo of Cutch in 1819, the British civil and criminal jurisdiction was

(1) L. R., 12 Ch. Div., 522 (2) 3 De G. F. & J., 583.

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excluded from Cutch, and this treaty remains still in force. It is true that, so far as certain political duties and feudatory obligations are concerned, Cutch must be considered as part of British India, but for the present purpose it is a foreign country regulated by separate laws and by a separate administration of justice. The practical inconvenience of dealing with the case in this Court is obvious. The partnership in question was conducted in Zanzibar, and the immoveables are in Cutch. The expense of the suit will be great, and assuming that the plaintiff obtains a decree, how is it to be enforced? Attachment, sequestration, arrest, and, in short, all the processes of execution have no efficacy outside our jurisdiction, and the only legal mode of enforcement would be to proceed on our decree, in the Cutch Courts, as in the case of a foreign judgment. I have already shown what Courts there are in Zanzibar, the other *forum* open to the parties. There is a decision much to the point in a case (*Matthœi* v. *Galitzin*[1]) where a Russian subject not resident in England attempted to restrain an English company from paying over to another non-resident Russian subject moneys accruing from a Russian mine. Malins, V. C., said: "It is no part of the business of this Court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject-matter within the cognisance of this Court." The case of *Cookney* v. *Anderson*[2] is also much in point in the principles laid down by Lord Westbury and the Vice-Chancellor. Although the case itself has since been overruled in *Drummond* v. *Drummond*[3], the general principles were expressly approved.

Now to sum up my decision. To decide that we have jurisdiction would be contrary to international comity and a violation of the principle that "no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions." *Extra territorium jus decenti impune non paretur.* There is no Indian decision in favour of jurisdiction where the defendant is a non-resident foreigner,

(1) 18 Eq., 341.

(2) 31 Beav., 452, and 1 De G., J. & S., 365.

(3) 37 L. J., Ch., 811.

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and the cause of action arises wholly outside the jurisdiction. The English decisions are all against such a jurisdiction. General principles are against it. If such cases were admitted our decisions might prove a mere nullity, a *brutum fulmen*. *Ex parte Blain*(1) clearly shows that any departure from the ordinary principles of jurisdiction requires the sanction of express legislation, and that mere general words are not sufficient. Just as in that case the word "debtor" was held only to mean a "debtor subject to English bankruptcy law," so in this case I hold that the words "if the defendant * * shall carry on business" in clause 12 of the Letters Patent must be interpreted to mean "if the defendant being a British subject * * * shall * * carry on business;" and that where the liability of a foreigner is in question, the "carrying on" must include actual residence. I must, therefore, decide this preliminary issue in favour of the defendant, with costs.

Attorneys for plaintiff:—Messrs. *Craigie, Lynch and Owen.*

Attorneys for defendant:—Messrs. *Little, Smith, Frere, and Nicholson.*

(1) L. R., 12 Ch. Div., 522.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

1888. *August* 3.

MOTIRÁM BHA'GUBHA'I, (APPELLANT), *v.* THE GORDON MILLS, LIMITED, IN LIQUIDATION, (RESPONDENTS).

Company—Winding up—Resolution to wind up—Dissentient shareholders—Notice of dissent—Requirements of such notice—Indian Companies Act VI of 1882, *Sec.* 204.

The shareholders of the Gordon Mills having passed a resolution for the voluntary winding up of the company, five dissentient shareholders gave notice of their dissent by a letter to the liquidators in the following terms:—

"With reference to the resolutions to wind up the above company voluntarily, and which were passed and confirmed on 14th instant, we hereby give you notice under section 204 of the Indian Companies Act VI of 1882, and require you to purchase the interest held by us in the said company at such price as may be determined either by private arrangement or by arbitration, as we are dissentients from such resolutions."

Held, that the letter was a sufficient notice of dissent under the provisions of section 204 of the Indian Companies Act VI of 1882

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ON the 23rd November, 1885, the shareholders of the Gordon Mills, Limited, passed a resolution, that the company should be wound up voluntarily, &c. The said resolution was subsequently confirmed on the 14th December, 1885.

On the 19th December, 1885, the appellant and four other dissentient shareholders gave notice to the liquidators of their dissent, under section 204 of the Indian Companies Act VI of 1882, by a letter in the following terms:—

"*Bombay, 19th December 1885.*

"TO THE LIQUIDATORS OF THE GORDON MILLS, LIMITED.

"Sirs,—With reference to the resolutions to wind up the above company voluntarily, and which were passed and confirmed on the 14th instant, we hereby give you notice under section 204 of the Indian Companies Act VI of 1882, and require you to purchase the interest held by us in the said company at such price as may be determined either by private arrangement or by arbitration, as we are dissentients from such resolutions."

No reply to this letter was received, and on the 5th November, 1886, the dissentient shareholders by their solicitors addressed the following letter to the liquidators:—

"*5th November 1886.*

"TO THE LIQUIDATORS OF THE GORDON MILLS, LIMITED.

"Gentlemen,—Messrs. Motirám Bhágubhái, Tuljárám Navalrám, Kapurchand Khengar, and others, the dissentient shareholders of the above company, have placed in our hands a copy of their notice, dated 19th December, 1885, served upon you, with instructions to write to you again on the subject. As you have as yet made no proposal to our clients to purchase the interest held by them, and consequently no agreement has been come to between you and our clients for the purchase of their interest, our clients call upon you to give us an early appointment for the purpose of appointing an arbitrator under section 206 of the Indian Companies Act.

"Your early attention to this is requested, as our clients cannot allow any more delay to take place in the settlement of these differences.

Yours faithfully,
JEFFERSON, BHÁISHANKAR, AND DINSHAW."

On the 16th November, 1886, the solicitors for the dissentient shareholders wrote again, as follows:—

"*16th November 1886.*

"TO THE LIQUIDATORS, GORDON MILLS, LIMITED, IN LIQUIDATION.

"Gentlemen,—We beg to draw your attention to our letter to you of the 5th instant, to which as yet we have received no answer. As the parties have

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not concurred in nominating an arbitrator, we are now instructed by our clients, Messrs. Motirám Bhágubhái, Tuljárám Navalrám, Kapurchand Khengar, Mámirám Dayábhái, and Castur Bhuga, to inform you that they have respectively nominated and appointed Mr. Bháishankar Nánábhái to act as their arbitrator, and to request you to name your arbitrator within the time mentioned in section 206 of the Indian Companies Act.

"We send you herewith the formal request in writing under the hand of each of our clients,

Yours truly,

JEFFERSON, BHÁISHANKAR, AND DINSHAW."

In that letter they enclosed the following letter from the appellant :—

"*Bombay, 15th November 1886.*

"MESSRS. JEFFERSON, BHA'ISHANKAR AND DINSHAW,
SOLICITORS FOR MOTIRÁM BHÁGUBHÁI AND OTHERS.

"Dear Sirs,—The liquidators of the Gordon Mills, Limited, have handed to us your letter to their address, dated the 5th instant, with instructions to inform you that the notice to which you refer, dated the 19th December, 1885, served upon them by your clients is insufficient and defective, and that they, the liquidators, do not and cannot in any way recognise the same.

"Consequently they decline to comply with the request contained in your letter of the 5th instant.

"As your clients' notice to the liquidators was insufficient, it is perhaps unnecessary to add, that there has been no discussion whatever between the liquidators and your clients as to any price to be paid them for their shares, and consequently there has been no dispute within the meaning of section 205 of the Companies Act.

"Since the above was written, our clients have handed to us your letter of the 16th instant with its accompaniments, and in reply thereto we are instructed to inform you that, for the reasons already above stated, our clients will not appoint any arbitrator.

Yours truly,

CRAIGIE, LYNCH, AND OWEN."

On the 31st July, 1887, the arbitrator appointed by the appellant sent a formal notice to the liquidators, that he would proceed with the reference on the 3rd June, 1887. In reply to that notice the attorneys for the liquidators sent the following letter to the arbitrator :—

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"*Bombay, 2nd June 1887.*

"BHÁISHANKAR NÁNÁBHAI, ESQUIRE.

THE GORDON MILLS, LIMITED; AND MOTIRÁM BHAGUBHAI AND ANOTHER.

"Dear Sir,—The liquidators of the Gordon Mills, Limited, have placed in our hands your letter to them, dated the 31st ultimo, giving them notice that you will, as an arbitrator, proceed with reference herein on the 3rd instant.

"In reply thereto we are instructed by our clients to refer you to our letter, dated the 25th March last, addressed on their behalf to your firm, and to state that our clients decline to admit that Mr. Motirám Bhágubhái and Mr. Tuljárám Navalrám are dissentient shareholders within the meaning of the Indian Companies Act, and they consequently dispute their right to appoint you to be an arbitrator, and also your right to act as an arbitrator in any matter concerning the affairs of the company which our clients represent.

"Under these circumstances our clients will not, of course, attend the meeting of which you give them notice.

Yours truly,

(Signed) CRAIGIE, LYNCH AND OWEN."

The appellant subsequently filed a petition to the High Court, praying that the submission to arbitration might be filed in Court.

The petition set forth the facts, and proceeded:—

"12. That Mr. Bháishankar Nánábhái thereafter proceeded with the reference so as aforesaid made to him by your petitioner, and gave notice of the proceedings before him to the said liquidators, but the said liquidators have, through their said attorneys, protested against Mr. Bháishankar's right to proceed with the said reference, and have declined to produce any books, papers, or documents relating to the said company. Copies of the said notices served by the said Mr. Bháishankar Nánábhái upon the parties and the letters of the said attorneys of the said liquidators are also hereto annexed, and collectively marked with the letter (J).

"13. That your petitioner is advised and he is desirous that the submisson to arbitration made by him as aforesaid may be filed in this Honourable Court, and that an order of reference may be made thereon."

On the 6th September, 1887, the matter came on for hearing in chambers before Bayley, J., who rejected the petition, on the

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ground that the notice given by the appellant on the 19th December, 1885, was insufficient under section 204 of the Indian Companies Act VI of 1882.

The petitioner appealed from the order of rejection.

Latham (Advocate-General) for the appellant:—We contend that the letter of the 19th December, 1885, is a sufficient notice under section 204 of the Indian Companies Act VI of 1882. It contains a notice of dissent, and it refers the liquidators to section 204, by a reference to which they could have ascertained their right to choose between the two courses prescribed. They have not been in any way misled or deceived. The fact that the appellant specifies the purchase of his interest as apparently the course preferred by him, could not have misled them. As West, J., says in *The Fleming Spinning and Weaving Company Case*(1), "the purpose of a notice is to convey certain information." The necessary information was conveyed by this notice. The liquidators indeed do not pretend that they have been misled. They rely merely on a most technical objection to our notice. West, J., says: (page 512) "It is not the function of liquidators to lay hold of every technical excuse for fleecing one member, or group of members, for the benefit of the others. They may do what an honourable set of partners would do. Certainly the latter would not say: 'We knew what you meant; but as your notice was defective in form, we will stand on our right to ignore it.'"

The case of *In re Union Bank of Kingston-upon-Hull*(2), relied upon in chambers, has no application whatever. It merely decided that the notice of dissent should contain the notice of requisition also Our notice does that.

[SARGENT, C. J.:—The section if read grammatically would seem to indicate that there should be two separate notices, *viz.*, a notice of dissent and a notice of requisition.]

Yes, that is so The point really before the Master of the Rolls appears to have been whether both notices should be contemporaneous, and he held that they should be, but he ex-

(1) I. I. R., 7 Bom., at p. 509. (2) L. R., 13 Ch. Div., 808, at p. 810.

pressed his opinion that "the whole should be one notice in writing."

Hannen, J., in *De Rosaz* v. *Anglo-Italian Bank*[1] seems to have thought that a mere notice of dissent under the section by a shareholder was sufficient, and created a duty on the liquidators to proceed as provided by the section.

Jardine, for the liquidators, *contra*:—The Legislature considered that notice in writing should be given, and prescribed what the notice should contain. We contend that the appellant's notice in question does not contain what the Act requires. It is not for us to say that the liquidators must have known what was meant by the appellants, or might have made inferences. The simple question is, whether the Act was obeyed or not. The Act requires the shareholder to give notice to the liquidators to do one of two things: *i. e.* he must specify both, and require them to do one or other as they may prefer. This notice does not do that, and is, therefore, not sufficient within the section. We do not contend that any specific form of words should be used, but the option should be expressly given to the liquidators. It is not the shareholders but the liquidators who have the right of choice. What the liquidators may have understood from the notice, is of no importance. To hold that would be to make the sufficiency of the notice vary according to the intelligence of the liquidator. The simple question is, does the notice comply with the section? If the liquidators had replied to this notice on the following day and refused to purchase the appellant's interest, and there the matter dropped, could it be held that the notice was sufficient? Counsel relied on *In re Union Bank of Kingston-upon-Hull*[2], and commented on *In re The Fleming Spinning and Weaving Company (Limited) in Liquidation*[3].

SARGENT, C. J.:—The question which we have to determine is whether the letter, dated the 19th December, 1885, by the appellant to the liquidators of the Gordon Mills was a valid and sufficient notice within the provisions of the second clause of section 204 of the Indian Companies Act VI of 1882.

(1) L. R., 4 Q. B. at p. 474. (2) 13 Ch. Div., 808.
(3) I. L. R., 7 Bom., 494.

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It is contended that this letter is insufficient, inasmuch as it only required the liquidators to purchase the interest of the dissentient shareholders in the company, and did not state the alternative course open to them under the section, *viz.*, to abstain from carrying the special resolution into effect. The learned Judge, from whose decision this appeal is brought, was of opinion that the notice was defective and insufficient, and he based his decision upon the cases of *In re Union Bank of Kingston-upon-Hull*[1] and *In re the Fleming Spinning and Weaving Company (Limited) in Liquidation*[2].

In the case of *In re Union Bank of Kingston-upon-Hull*[3], however, it is quite plain that the question upon which Jessel, M. R., expressed his opinion, was not as to the exact form in which the notice should be given, but rather as to "whether the notice of the dissentient shareholder that he dissents, should also contain the notice either to abstain from carrying the resolution into effect, or to purchase the shares," and his decision was "that the whole is to be one notice in writing." That is really the point which he decided. No doubt there are expressions in his judgment which taken by themselves might be supposed to indicate what he thought should be the form of the notice, but it is clear that that was not the question which was present to his mind and which he intended to decide. He did not mean to lay down any rule as to the special form which was necessary for a valid notice, but merely that the two matters, *viz.* the dissent and the requisition, should be comprised in the one notice.

Then the case of *In re The Fleming Spinning and Weaving Company (Limited) in Liquidation*[4] has been relied on. But neither was the decision in that case upon the point now before us. The decision there was that, however informal and irregular the notice given by the shareholder might have been, nevertheless the liquidators by their conduct had waived the informality, and that by reason of their conduct the dissentient shareholder was entitled to proceed as if his notice had been perfectly formal and

(1) L. R., 13 Ch. Div., 808.
(2) I. L. R., 7 Bom., 494.
(3) L. R., 13 Ch. Div., 808, at p. 810.
(4) I. L. R., 7 Bom., 494.

valid. That decision cannot, therefore, be of much assistance to us in the present case.

The point which arises here is whether this letter of the 19th December, written by the appellant to the liquidators, was a sufficient notice under the Act. It is to be observed that it states the writer's dissent from the resolutions, and, further, that it contains an express reference to section 204 of the Companies Act (VI of 1882). In fact, the notice given by the letter is stated to be a notice under that section. It is true the letter proceeds to require the liquidators to purchase the shareholders' interest in the company, which is only one of the two courses either of which the liquidators may adopt. We think, however, that the reference to the section contained in the letter is sufficient to incorporate into the notice the other alternative, and renders it a notice which gives the liquidators the option which they are entitled to exercise under the section.

It is to be observed, that the Act prescribes no particular form of words in which the notice is to be given. It is reasonable, therefore, to hold that any notice in writing, however expressed, would be sufficient if it clearly conveyed to the liquidators the dissent of the shareholder from the resolution, and his demand that they should either abstain from carrying the resolution into effect, or purchase his interest in the manner prescribed by the Act. We think that, substantially, the letter in question gave such notice, and that it is impossible to suppose that the liquidators could have misunderstood it.

To hold otherwise would be to give a very technical construction to the section. We agree with West, J., "that while adhering generally to the principles of construction laid down from time to time by English Courts of law on the various parts of these Acts, we should not forget that such enactments when introduced into this country have to be applied to a people for the most part unfamiliar with our business ways and experience, as well as with our language,— a consideration which makes it desirable that we should be careful not to clog the interpretation and application of these enactments with unnecessary refinements

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and technicalities which are not made imperative by the plain words of the Act"[1].

We, therefore, hold the notice in question to be a good notice, and allow this appeal.

Appeal allowed.

Attorneys for the petitioner:—Messrs. *Jefferson, Bhálshankar, and Dinshaw.*

Attorneys for the liquidators:—Messrs. *Craigie, Lynch, and Owen.*

(1) *Per* West, J., I. L. R., 7 Bom., at p. 508.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

1888. *March* 15.

THE COLLECTOR OF RATNA'GIRI, (ORIGINAL DEFENDANT), APPELLANT, *v.* ANTA'JI LAKSHMAN, (ORIGINAL PLAINTIFF), RESPONDENT.*

Khot—Proprietary right of khot to khoti vatani land—Right of such khot to forest land and to timber and wood growing therein—Government, right of, to appropriate to forest preserves assessed or unassessed land—Construction of such khoti grants.

The plaintiff sued the defendant, alleging that the village of mauze Ambedu, in the Ratnágiri District, was his *khoti vatani* village in which his proprietary right extended to raise crop of any kind or to preserve and cut the jungle and forest trees on the lands therein. He complained that since 1855-56 the Collector of the district prohibited him from exercising the above alleged rights, and prayed that the obstruction might be removed and Rs. 600 awarded as damages. The plaintiff based his claim mainly on the settlement of 1788, Dunlop's proclamation of 1824, and several other *khoti* grants in the district. The defendant denied that the plaintiff had any proprietary right in the village, and contended *(inter alia)* that the *khot* derived his rights from the yearly *kabuldyats* passed by him, that his right to cultivate did not extend to cultivating the jungle land, and that his position was no better than that of a *patel*.

The Joint Judge who tried the suit held that under the settlement of 1788 the plaintiff, as *khot*, was entitled to the jungle produce, except timber; that in virtue of Dunlop's proclamation of 1824 the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it, and that the defendant had no right to appropriate assessed or unassessed land for forest purposes, and awarded the plaintiff the sum of Rs. 600 as damages. On appeal by the defendant to the High Court,

Held, that the application of the general rules of construction of grants to a subject by the State requires that language of such general import as is ordinarily to be found in the *khot's sanads*, should be taken most beneficially to the State.

* Appeal, No. 21 of 1868.

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Held, accordingly, that, in the absence of a *sanad* expressly granting it, the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the *vatandári khotship*,

Held, also, that the grant of the *vatani khoti* did not make the *khot* a perpetual tenant of Government in respect of all lands in the village, except *dhárá* lands.

Held, on the authority of *Tájubái's Case*(1) and *Rámchandra N. Mahájan* v. *The Collector of Ratnágiri*(2), that a permanent relationship was created between the Government and the *khot* which could not be interfered with as long as the settlement of 1788 was in force, except with the *khot's* consent, and, therefore, that in 1855, when the *pahání* of 1788 was in force, the Government could not withdraw the *thikán* in question from the plaintiff's cultivation.

Held, also, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, the plaintiff was entitled to cut down brushwood whether as a source of revenue or for the purpose of bringing the land into cultivation.

Held that the respondent was entitled to damages for the years during which he had been excluded, and to an injunction restraining the defendant from excluding him in the future.

Held, also, that, as *khot*, the respondent had no right to cut timber in forest and uncultivated lands whether by virtue of his *khotship* or Dunlop's proclamation(3).

THIS was an appeal from the decision of Baron de H. Larpent, Joint Judge of Ratnágiri.

The facts of the case are fully stated in the judgment of the Court.

Shántárám Náráyan for the appellant:—A mere *vatandár khot* is not a proprietor of the soil. He is simply a revenue farmer, and resembles a *patel* in the Deccan. He is, at best, a

(1) 3 Bom. H. C. Rep., 132, A. C. J. (2) 7 Bom. H. C. Rep., A. C. J., at p. 43.

(3) The proclamation by the Government of the Hon'ble the English (East India) Company represented by J. A. Dunlop, Esquire, the Collector and Magistrate of the Southern Zilla*** :—"Whereas the Government has observed that the former Government used to take the teak, blackwood, and other good timber grown on the lands situate in the aforesaid zilla belonging to any person whatever, the people did not take the trouble of raising (such timber trees); and (whereas the Government) thinks that it would be to the advantage of all if from this day forth teak, blackwood, and any other kind of good timber (trees) were raised in the country, it is proclaimed to all the people that the Government has no intention (eye) towards the trees that may be growing on the lands of any person whatever situate beyond the frontiers (limits) of the jungles preserved by the Government *** that those who may own and may grow hereafter (such trees) may (*i.e.* have the liberty to) deal with them in any manner they like; and that no obstruction whatever will be made by the Government (to their so doing)."

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headman of the village and a Government officer like the *patel*: see Bombay Gazetteer, Poona, Vol. XVIII, Part II, pp. 313—16. Not only has a *khot* no proprietary right in the village land, but it is at the disposal of Government, who has the right to appropriate it to any use it pleases. The right to cultivate waste lands was given simply to remunerate the *khot* for the services he rendered to the Government—*Rámchandra N. Mahájan* v. *The Collector of Ratnágiri*(1). In the time of the Peshwás there were two kinds of *khots*, *viz.*, a *vatandár* and a non-*vatandár khot*. The one was a permanent *khot*, who was not liable to be removed at any time by a *subhedár*, as the other was. A *khot* having land under his own cultivation has not to pay assessment, which is the only privilege he has, but he cannot claim it as owner. The *sanad* relied on (Exhibit $\frac{1}{18}$ of 1700) does not grant any right in the soil, as there are not the words "waters, trees, stones, &c.", which are necessary to pass right in the soil. Under the *sanads*, on which the plaintiff relies, there was only the right to bring under cultivation the soil of the village and collect assessment. A *khot* is a collector of *sarkár dast*. The tenants are not his tenants. The tenants are to pay assessment according to the customary scale which the *khot* is to collect for Government and pay it in: see *Tájubái's Case*(2). A *khot* can give *kowls* to cultivators, but they are liable to be set aside by Government. Whatever his tenants pay him is not rent paid to him, but rent paid for Government. All these circumstances negative the assertion that he has a proprietary right in the village soil. As to *khots*, see *The Collector of Ratnágiri* v. *Vyankatrán*(3). In *Trimbak Váthal* v. *Náráyan Dhondbhat*(4) it was held that, in the absence of the words "waters, trees, &c.," in his *sanad*, no right in the soil could pass to a *khot*: see also *Moro Abáji* v. *Náráyan Dhondbhat Pitre*(5). If an *inámdár* could establish his proprietary right against a *khot*, much more so can Government if it has not given by its grant a proprietary right. If an *inámdár* has a right to deny a *khot's* right to cut forest, much more has Government, the *khot* being its mere servant.

(1) 7 Bom. H. C. Rep., at p. 45 A. C. J.

(2) 3 Bom. H. C. Rep., 132 at p. 149, A. C. J.

(3) 8 Bom. H. C. Rep., 1, A. C. J.

(4) Printed Judgments for 1881, p. 270.

(5) I. L. R., 11 Bom., 680.

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Macpherson (Acting Advocate-General) and *Jardine* (*Dáji Ábáji Khare* with them):—The relation between the *khot* and Government precludes Government from resuming a *khot's* village land. The primary object in bringing him into the village was to reclaim and render cultivable the waste land therein: see Selections by Mr. Candy, pp. 5 and 11. As a matter of contract, therefore, it is inconsistent that Government should resume such land when he has spent his capital on improvement of the soil. In this case the land was brought under cultivation, but was left fallow when Government resumed it. As *vatandár khot* the plaintiff had a proprietary right in the soil, and had every right to resist the resumption by Government. The plaintiff, as a matter of fact, spent a good deal on the land; and whether on the principle of an express contract or as equitable principle the land could not be resumed by Government. The *khoti vatan* was given to the plaintiff in perpetuity. Having regard to the grant and the other *sanads* of a like nature, Government has now no right to disturb the plaintiff. The words "waters, trees, &c.," are not essential to pass proprietary right. These words simply make the grant more clear. Government granted the land in perpetuity, and the plaintiff for his part bound himself to collect and pay the assessment to Government. By the grant, Government did not reserve its right to resume or to disallow cultivation or cutting of forest. A *khot* has a right to give leases of the village land, to bring it under cultivation, and exercise all rights of ownership. There have been instances of partition. The *khot* was held entitled to the land of his village—*Hyderkhán* v. *Alikhán*[1]. A fair construction of the *sanads* produced will establish that the grant to the plaintiff was out and out an absolute grant subject to payment of assessment. A *dhárekari* is an absolute owner, and *khot* can create a *dhárekari*. There are cases where Government has paid compensation to *khots* for land resumed. A *khot* has been recognized as a proprietor of the soil: see section 3, Act (Bom.) VII of 1863; Reg. XVII of 1827, sec. 8. He is not the same as a *patel*. The functions of both are quite different; see Captain Dowle's Rep., Vol. II, pp. 298, 236; Selected Cases, Sud. Diw. Adálut, 144 (ed. 1843). The grants of

(1) 9 Harring. Rep., 582.

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kowls alluded to for the appellant were grants to purchasers from *khots*. A *kabuláyát* amounts to an acknowledgment of the right of Government to revenue of the *khoti* village. Government has no right to take cultivated or uncultivated land of the plaintiff's village. *The Collector of Ratnágiri* v. *Vyankatráv*[1] does not decide what a *khot* is. The cases cited do not apply.

SARGENT, C. J.—The plaintiff in this case by his plaint, registered as a plaint in *formâ pauperis* on the 10th July, 1864, alleges that the village of mauze Ambedu Khurd, táluka Ratnágiri, in the zilla of Ratnágiri, is his *khoti vatani*, and that the whole of the proprietary right belongs to him of either raising crops of any description whatever from, or of preserving and cutting the jungle and forest trees on, the lands of the said village; and he complains that since 1855-56 the Collector of the district has prohibited him from raising crops on the *thikan* "*kond assorda*" mentioned below in his plaint and cutting trees on the village lands, and prays that the obstruction by the Collector be removed, and a decree be made for the payment by the defendant of Rs. 600 as damages.

The Assistant Judge, having refused an application by the defendant for further time to put in his written statement, framed the following issues on the 5th November, 1864:—

1. Whether the plaintiff has any and what title or tenure in the village Ambedu Khurd?

2. Whether such title carries with it a qualified or unqualified right to the uncultivated or forest land within the said village and to all or any timber, brushwood, and trees of all kinds growing on such lands?

3. If qualified, to what extent?

4. Whether by legal enactment, or by any local custom or usage having the force of law, defendant was justified in appropriating or setting apart, as forest preserves, the unassessed or the particular assessed land named in the plaint?

5. As to the claim for damages on account of the assessed lands so reserved.

(1) 8 Bom. H. C. Rep., 1, A. C. J.

The Joint Judge found these issues in favour of the plaintiff.

On appeal to this Court the decree of the Joint Judge was reversed, in order that the defendant might put in a written statement, and that there might be a fresh trial. The Collector accordingly filed a written statement, and at the new trial the same issues were settled as on the first trial, with the following additional issue:—

Is the plaintiff's right barred by the *kabuláyatdár* having accepted compensation?

The Joint Judge found that, under the settlement of A. D. 1788, plaintiff was entitled, as *khot*, to the jungle produce, except timber, and to cultivate the jungle or waste lands of the village; that, in virtue of Dunlop's proclamation in 1824, the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it; that the defendant had no right to appropriate assessed or unassessed lands for forest purposes, and that there had been no acceptance of compensation by plaintiff for the *thikan* in question; and, lastly, he assessed the damage sustained by plaintiff at Rs. 600, and directed defendant to pay plaintiff that amount, and no longer to obstruct his occupation of the *thikan* in question. Against this decision the Collector filed a memo. of appeal on the 5th December, 1868, the hearing of which has been postponed by the parties till the present time.

With respect to the particular land in question which was taken up by Government for the purpose of making a forest preserve, it was treated by the Joint Judge as having been assessed by the Peshwa authorities on the occasion of the last settlement in 1788. We think this was incorrect, although in the view we take of the rights of the parties it is not material whether or no the *thikan* in question had been assessed. The Joint Judge arrived at his conclusion on the strength of Exhibit 31, which is an extract from the record of the survey in 1788. It appears, however, from the record itself, which was produced before us, that the headings of the several entries are omitted in Exhibit 31, and that the land mentioned in sheet 26, which, from the description of it, can scarcely be doubted is the land in ques-

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tion, was waste land and not included in the assessment of the village. The respondent had inspection of the book, and tacitly admitted the justice of the conclusion, that the Joint Judge had been in error in deeming the *thikan* in question to have been assessed land. On the other hand, the evidence given by the plaintiff's witnesses shows that when this suit was brought, it was *varkas* land lying on the hill side which had been cultivated in past years, according to the custom of the country, for the purpose of producing a crop of the inferior descriptions of grain, which such land is capable of doing every four or five years with very little labour expended on it. Mr. Shántárám indeed objected to this evidence being used, because it was only taken on the trial before Mr. Izon, whose decree was reversed by this Court. But the Collector's *vakil*, as appears from the *roznáma*, was present on the occasion when it was taken, it was treated as evidence on the second trial without any objection being taken by the defendant, and it was open to the Collector to have given evidence on that trial contradicting it, had he thought it of importance to do so. Mr. Shántárám admits it would be useless now to attempt to give any evidence on the subject, and does not ask to be allowed to do so. We may mention here that this description of cultivation, *i.e.* "*varkas* or the cultivation of dry grains", is stated by Mr. Wingate, in the 11th para. of his report on the survey and assessment of Ratnágiri, as being "pushed over every part of the surface of the collectorate of Ratnágiri where there is soil to raise a crop at all, even to the summit of the highest hills, the lands so cultivated being divided into the more level parts where the plough can be used and the steeper slopes admitting only of cultivation by manual labour. Further, that the best kinds bear crops for five or six successive years, and then require a fallow of nearly equal duration, the inferior kinds requiring longer fallows, and the worst only bearing two crops, it is said, in twelve years," and he concludes in the 12th para. with the remark that, "as far as he could see or learn, there was little, if any, unappropriated waste which is never cultivated to be found in the collectorate" The *thikan* in question must, therefore, we think, upon the evidence in the case, be taken to have been unassessed at the last *pahání* of 1788, but to have been

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varkas land on the hill side at the time it was appropriated by Government, but which had been up to that time cultivated according to the custom of the country, as above described, with respect to such land.

The plaintiff's right to be a *vatandár khot* was not disputed before us. The questions, therefore, for consideration are, first, whether the plaintiff was entitled to cut timber and other trees growing on uncultivated or forest land as raised by the second issue, and secondly, whether the Government had the right in 1855-56 to preclude the *khot* from continuing the cultivation of the above *thikan* by appropriating it to forest purposes. The plaintiff describes himself in his plaint as the owner of the village, and it has been contended before us that the grant of the *vatani khoti* carries with it the ownership of the soil of the village. This conclusion is opposed to the repeated decisions of this Court, which are distinct in holding that, in the absence of a *sanad* expressly granting it, the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the *vatandári khotship* This was laid down distinctly in *Tájubái's Case*[1], where it was held that the *khot* had only an hereditary right of farming the village. In Regular Appeal No. 15 of 1869 reported in Printed Judgments for 1875, page 325, where the question was as to the right to cut timber on forest lands, Westropp, C.J., and Kemball, J., held that the *khots* were not, as such, owners of the soil of the village in the absence of words in the *sanad* under which they claimed which could be construed to have that effect. In *Trimbak Vithal* v. *Náráyan Dhondbhat*[2], the question arose between the *khot* and a subsequently created *inámdár* of the village as to the forest land, and the Court, consisting of Westropp, C. J., and Nánábhái Haridás, J., held that the soil of the entire village, so far as the Government could pass it, passed by the words of the *inám* grant to the *inámdár*, and that as the document on which the *khots* relied contained nothing to show that the forest or trees thereon were vested in them, the *inámdárs* and their assignees were entitled to the *soil*

(1) 3 Bom. H. C. Rep., 132 at p. 149, A. C. J.
(2) Printed Judgments for 1881, p. 278.

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and trees of the forest. Lastly, in *Moro Abáji* v. *Náráyan Dhondbhat Pitre*[1], where the parties were the same as in the last case, but the question was as to culturable lands, the Court, consisting of West and Nánábhái Haridás, JJ., says "they" (*i. e.* the *khots*) "have relied on a general proprietary title as involved in their *khotship*, which was conclusively negatived by the previous judgment of this Court. They have produced some instances of *khotships* created or enjoyed with such proprietary rights. The adjunction of these in a few special instances would by no means prove that they were generally incident to a *khotship*. In the case of '*bhadigi*,' or temporary leasehold *khotship*, it seems admitted they were not so, and that is enough to show that they are not essential to the conception of *khotship*. But for the purposes of the present case reference to the previous judgment is sufficient. That decides that, in the case of this village and as between the parties before us, the *khotship*, as such, did not comprise ownership."

Exception, however, has been taken by the respondent to the above decisions, on the ground that they are not borne out by the important documentary evidence in this case, and which, it is said (and probably with truth as to a large part of it) was not before the Courts on the previous occasions. That evidence was analysed and discussed at the hearing of this appeal with great industry and ability on both sides, but the conclusion we have arrived at, after a careful examination of it, is that the inference from the above decisions, *viz.*, that the *vatandár khotship* does not carry with it the proprietary right of Government in the soil, derives most important confirmation from the documentary evidence before us. A very important part of that evidence consists of 150 *vatandári khoti sanads* put in by the appellant, all of which, with two exceptions—*viz.*, *sanads*, Exhibits 89 and 68, granted by the British Government—come from the Peshwá's Daftar and go back far into the last century, and were relied on by both sides as throwing important light on the *khoti* tenure. The language of the Peshwá's *sanads* (with the exception perhaps of one, Exhibit $\frac{14}{140}$, in which the enjoyment, as *vatandár khot*, of

(1) I. L. R., 11 Bom., 680, at p. 686.

the "trees, palms, lands cultivable and uncultivable which exist in the village" is granted) is almost uniformly the same, and it will be sufficient, we think, to refer to Exhibits $\frac{1}{5}$ and $\frac{1}{8}$ to show what was understood by the Native authorities by the grant of the *vatani khoti*. The former *sanad* recites that the grantee had been carrying on the *khoti* as a *badhekari*, and had asked that the *khoti* might be conferred on him as "an hereditary estate and office", as that would give him encouragement to spend the necessary money and bestow the necessary labour upon the land, whether rice land or *varkas* land, as existing from ancient times and also upon such additional land which might be useful for cultivation, and thus by bringing lands under cultivation and by bringing in tenants he would make the village flourishing, and it concludes thus:—"Having considered and enquired into the matter and having found that there was no *vatandár khot* and that the business was done by *badhekaris*, and as we think that by conferring the village upon you the lands would be cultivated and brought into a state of perfection, we, having regard to the cultivation and prosperity of the village, have conferred on you the *khoti vatan* of the aforesaid village. Therefore do you, your sons, grandsons and other descendants enjoy the *vatani khoti* of the village together with *mánpáns*, and cultivate and bring the village into a state of perfection and collect the Government assessment according to the practice prevailing in the country." Again in Exhibit $\frac{1}{6}$, after reciting that the grantees had represented "that the village had been lying desolate, that *badhekari khots* were carrying on the *khoti*, but that the village was not properly cultivated and populated, and that in consequence they had been asked to carry on the *khoti*, that thereupon they had populated and cultivated the village, that if a *vatanpatra* were granted them they would be encouraged to bring the village into a flourishing condition and recover the Government revenue," it proceeds thus:—"Thereupon after finding that there was no *vatandár khot* and what they said was true, the *khoti vatan* has been granted to you. You are to cultivate the village, recover the Government revenue, and carry on the management of the *khoti* as a *vatan* from generation to generation." In Exhibit $\frac{1}{10}$, much relied on by the respondent, the words are "do you

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also as *vatani khot* enjoy the trees and palms, the *malkhandi* land, rice fields, cultivable and uncultivable lands which exist in the village, and having regard to the cultivation and prosperity of the village lands do you collect the Government assessment according to the custom of the country."

The language of these *sanads*, which is a fair sample of the contents of the large body of *vatani sanads* put in evidence, shows that the grant of the *vatani khoti* did not change the character of the *khoti*, but created a permanent tenure of the *khoti* in lieu of the temporary and precarious holding of the *badhekari khot*, and, further, that in both cases the *khotship* consisted in promoting the cultivation of the village lands and collecting the Government revenue. No words, however, are to be found in them showing an intention to pass the proprietorship of Government in the soil; and had such been the intention we should, as stated by the Court in the Printed Judgments for 1875, p. 331, have expected to find such words as "waters, trees, stones and quarries, mines and hidden treasures" which are frequently found in grants in *inám*, and which in *Rávji Náráyan* v. *Dádáji*[1] were held to pass the proprietary right and ownership of Government in the soil of the villages. In Exhibit $\frac{18}{140}$ it is true the trees and lands are expressly mentioned, but it is only the enjoyment of them as *vatandár khot* which is granted. It was said indeed for the respondent that the above words were merely formal, and their omission of no significance. The documentary evidence relied on (*viz.*, Exhibit $\frac{18}{148}$ taken in connexion with Exhibit 90 and Exhibit $\frac{18}{144}$ read in connexion with Exhibit $\frac{18}{32}$) does not, in our opinion, in any way support this view, but even if it were otherwise it is quite sufficient, in our opinion, to say that the application of the general rule of construction of grants to a subject by the State requires that language of such general import as is alone to be found in these *sanads* should be taken most beneficially to the State, and, therefore, construed so as to exclude the intention of passing the proprietorship of Government in the soil. This alone renders it unnecessary to discuss in detail the evidence relied on by the Collector as to its having

(1) I. L. R., 1 Bom., 523.

been the practice of the Native Government during the 18th century (a practice would be inconsistent with the *vatani khot* being a proprietor of the soil) of granting not only entire *vatani khoti* villages in *inám* with the above words importing the conveyance of the ownership of the soil, but also specific portions of *khoti* villages described by metes and bounds. We may, however, say that Exhibits $\frac{1}{1}\frac{5}{5}$, $\frac{1}{1}\frac{5}{6}$, $\frac{1}{1}\frac{5}{8}$ and $\frac{1}{1}\frac{5}{4}\frac{7}{7}$ are, in our opinion, satisfactorily proved to be cases of the first description, and Exhibits $\frac{1}{1}\frac{5}{6}\frac{8}{7}$, $\frac{1}{1}\frac{5}{4}\frac{8}{9}$, $\frac{1}{1}\frac{5}{5}\frac{8}{6}$ and $\frac{1}{1}\frac{5}{5}\frac{8}{7}$ of the latter.

But although, in our opinion, it must be taken as conclusively established, both by authority and by the evidence produced in the present case, that the proprietorship of Government in the soil of the village does not, in the absence of a *sanad* expressly conferring it, vest in the *khot* by his appointment as *vatandár khot*, the question still remains as to what is the precise nature of the rights which the *vatandár khot* acquires by virtue of the grant in perpetuity of the right of cultivation of the village lands which is expressly made incidental to the *vatani khotship* of the village. And here both parties have taken up a position far higher than can, in our opinion, be justified either on historical grounds or the documentary evidence in the case. It was, on the one hand, contended by Mr. Shántárám, for the Collector, that the *khot* was merely an officer or agent of the Government, whose duty it was to develop the cultivation of the village lands and that his position with respect to Government differed in no respect from that of the hereditary *patel* of the Deccan, except in the circumstance that the Government settled annually with the *patel* the amount of revenue to be collected and with the *khot* at intervals of five or ten years, but it is to be remarked that this view is entirely opposed to that taken by the several officers of Government who reported on the nature of the *khoti* tenure in the early years after the introduction of the British rule into the Konkan. The reports of Mr. Polly in 1819, Mr. Chaplin in 1821, Mr. Dunlop in 1824, Lieutenant Dowell in 1829, Captain Wingate in 1851, Mr. Turquand's Letters to Revenue Commissioner in 1856, for which reference may be found at pages 9, 11, 16 of Mr. Candy's Selections, show that they all concur in

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describing the *vatandár khot* as an "hereditary farmer of the revenue,"—a character which has indeed been uniformly conceded to him by Government whenever his rights have been in issue, and was found to be his correct description in *Túyubái's Case*(1). The history of the Deccan *patels*, for which it is sufficient to refer to the Bombay Gazetteer, Vol. XVIII, p 318, shows, on the contrary, that the *patels* were only hereditary officers, who were compensated by perquisites and freehold lands allotted to them as wages, except during the short period between 1796 and 1819, when the village revenues were farmed by the *patels*, who then settled with the Government for a lump sum,—a system, however, which was abolished by the British Government on the advice of Captain Pottinger at the latter date Lastly, the difference of treatment of the two classes by the British Government when the Deccan and Konkan were annexed, more especially as regards the introduction of the *rayatwari* system which was caried into operation in the Deccan in 1818, can scarcely leave a doubt that the British Government found, on enquiry, that the *khots* of Konkan did occupy, both historically and in fact, a different position from the *patels* of the Deccan,—a difference which indeed may well be accounted for by the poorness of the soil in the Konkan generally and especially in the Ratnágiri District, where the *khoti* villages abound, and which necessitated the introduction of capital for the development of the cultivation and prosperity of the villages.

On the other hand, it was contended for the respondent, that the *vatani khot's* right by virtue of his appointment as such consisted in the exclusive right of cultivation of the entire village lands, or, as it was sometimes expressed, that the *vatandár khot* became the perpetual tenant of Government in respect of all the lands in the village except *dhárá* lands. There are, however, no clear and distinct words to that effect to be found in any of the *sanads* which could, with due regard to the rule of construction of grants by the State already mentioned, admit of such an intention, so opposed to the best interests of the State, being inferred on the part of Government; and if cor-

(1) 3 Bom H C. Rep., 132, A C. J.

roboration were required that such was not the intention, it is to be found in the long-established usage, both of the Native and British Governments, of granting *kowls* to individuals other than *khots* (as shown by the large body of evidence in the case) under which they were put into possession of portions of the uncultivated village lands on favourable terms as to payment of rent without the intervention or consent of the *khot* so far as appears on the face of the *kowls*, which in some cases are addressed to the *khot* himself in mandatory terms. However, the nature of the *khot's* right of cultivation as established by custom has been the subject of judicial decision. In *Tájubái's Case* (1), where the *khot's* rights underwent the fullest enquiry and consideration in the lower Courts, it was found as one of the material facts with regard to the well-established custom of *khoti* tenure, that "as the *khot* settles with Government for assessment of the village as a whole or for his share in it, it follows that he may let out for cultivation, or himself cultivate, without making any additional payment to Government on that account, any waste or uncultivated land of the village;" and in delivering judgment the majority of the Court in *Tájubái's Case* say "the right to cultivate such waste or other lands as might be at the *khot's* disposal, or to give them out in cultivation on such terms as might be most to his advantage, must be regarded as the recognised mode of remuneration for services rendered." This statement of the *khot's* position is referred to with approval by Couch, C. J., and Melvill, J., in *Rámchandra Mahájan* v. *The Collector of Ratnágiri* (2). At the same time it was held in both those cases that the *khot's* right of cultivation and privileges, as stated above, were dependent on his fulfilment of the functions of the *khotship*. Subject, however, to the above condition, the custom of the tenure as so found confers on the *khot*, whilst the settlement exists, the right of cultivating the lands of the village and making the most of them. In other words, a permanent relationship is created between Government and the *khot* which cannot be interfered with as long as the settlement remains in force, except with the *khot's* consent, and, therefore, applying this ruling to the present case

(1) 3 Bom. H. C. Rep. 132, at pp. 149, 151, A. C. J.

(2) 7 Bom. H. C. Rep., 41 at p. 45.

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(whether the land in question was assessed or not) in 1855 when the *pahání* of 1788 was still in force, the Government could not withdraw the *thikan* in question from his cultivation. It was doubtless contended by the Collector, that the *khot* derived his rights from the yearly *kabulâyat* which he was in the habit of passing under the British *váj*; but we entirely agree with the Court below, that the *kabulâyats* passed by the Ratnágiri *khots* can only be regarded as "formal agreements by which the *khot* engages to make good the fixed sum at which the revenue is assessed, coupled with two securities for the punctual payment of the revenue."

It was urged, however, for the appellant, that the *khot's* right of cultivation did not extend to cultivating the jungle on the land in question. But no attempt was made before us to dispute the conclusion of the Court below, that the plaintiff had uninterruptedly enjoyed the jungle produce and brushwood growing on it and the right to cultivate it, and indeed we agree with the remark of Mr. Izon, who tried this case on the first occasion, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, it is to be presumed that a person having the hereditary *khotship* of the village with the right cultivation is entitled (although not perhaps exclusively) to cut down jungle, *i.e.*, brushwood, whether as a source of revenue or for the purpose of bringing the land into cultivation. In this view, therefore, of the *khot's* rights the respondent would necessarily be entitled to damages for the years during which he had been excluded from the enjoyment of the *thikan* in question as assessed by the Court below, and for an injunction restraining the Collector from excluding him in the future, at any rate during the continuance of the *pahání* of 1788. Whether on the occasion of a new settlement the Government could withdraw the land from cultivation, was not before the Joint Judge; and it is plain from the ground of decision adopted by the Joint Judge, which rested entirely on the fact of the *thikan* having been assessed in 1788, that the injunction granted by him was not intended to prejudice any such question. On this appeal, as indeed could not be otherwise, the question has not been argued, although the

discussion which the general nature of the *khoti* tenure underwent may have an important bearing on it when it arises. We are, therefore, not called upon to express any opinion on the particular question, and it would be highly inconvenient to do so. As to the respondent's right to cut timber on the forest and uncultivated land raised by the second issue, the case in the printed judgments for 1875, page 325, is a distinct authority, at any rate as to forest land, that, in the absence of a *sanad* expressly granting the right to cut timber and the proprietorship in the soil of the village, the *khot* cannot assert such right as *khot* or under Dunlop's proclamation. In *The Collector of Ratnágiri* v. *Raghunáthrán* [1], Melvill, J., considered that the ruling in the last case amounted to a decision that a *khot* has no right to cut timber, either as a *khot*, or by virtue of Mr. Dunlop's proclamation on land held by him as a *khot*, unless he could prove the grant of a proprietary title in the land of the village, and applied it to timber growing on "land held by him either as *khot*, or as tenant under the *khoti* co-parceners." It may be a question whether this did not carry the ruling beyond what was the intention of the Court, as Westropp, C. J., distinctly refrained in his judgment from expressing any opinion upon the general rights of *khots*, and what is even more important, referred without disapproval to his decision in *The Collector of Ratnágiri* v. *Vyankatráv Náráyan Surve* [2], in which, whilst reserving his opinion as to ordinary *khoti* lands, he held that at any rate as regards *khasgi* or *khoti nisbat* lands the *khot* had a proprietary right which would entitle him to the benefit of Dunlop's proclamation; but however that may be, the conclusions arrived at in this judgment render it impossible to hold that the *khot* has any right of proprietorship in uncultivated land which could fall within the contemplation of Dunlop's proclamation.

We must, therefore, confirm the decree, except so far as it declares that the respondent is entitled to cut the timber on the uncultivated and forest land, and declare that the respondent is not so entitled. Parties to pay their own costs throughout.

(1) Printed Judgments for 1875, p. 324.
(2) 8 Bom. H. C. Rep. 1, at p. 4, A. C. J.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

1888. *April 5.*

SHANKAR GOPA'L AND OTHERS, (PLAINTIFFS), *v.* BA'BA'JI LAKSHMAN AND ANOTHER, (DEFENDANT).*

Vatanddrs' (Bombay) Act III of 1874, Sec. 10—Decree—Execution—Transfer of vatan property from one not vatandár—Construction—Collector's certificate prohibiting delivery of decreed property—Practice—Procedure.

The plaintiff Shankar and his brother, who were *vatandár deshpándes*, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant Bábáji. Bábáji objected, on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour, and that decree was confirmed by the Special Judge. The plaintiffs being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under section 10 of (Bombay) Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court.

Held, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a *vatandár*, to the daughter, who, according to the Collector's certificate, was also not one, section 10 of (Bombay) Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under section 6, clause (1), of the Act.

THIS was a reference by Ráv Sáheb Rámchandra Bálkrishna Chitale, Subordinate Judge of Sángola and Málsiras, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs Nos. 1 and 2 sued in the Subordinate Judge's Court at Sángola to redeem certain land from defendant No. 1, to whom they alleged it was mortgaged by their deceased paternal aunt one degree removed, who lived united with them and died leaving no heirs nearer than themselves. Defendant No. 1 pleaded that plaintiffs Nos. 1 and 2 were not the heirs of the deceased mortgagor, as she left a daughter surviving her. The daughter was accordingly made plaintiff No. 3 with her own consent, and the case was proceeded with to judgment, which was delivered on the 12th August, 1886, in favour of plaintiff No. 3.

* Civil Reference, No. 53 of 1887.

Not satisfied with this decision, plaintiffs Nos. 1 and 2 applied for revision to the Special Judge, who confirmed the decree on the 21st April, 1887.

Before the decree was confirmed by the Special Judge, plaintiff No. 1 applied to the Collector of Sholápur praying for the issue of the certificate under section 10 of the Vatan Act, (Bombay) No. III of 1874, on the ground that the property was *deshpánde inám*, and could not pass, as such, out of the family of the *vatandárs*. The certificate was granted accordingly and sent to the Subordinate Court at Sángola, in order that the decree might be cancelled. It was dated the 22nd March, 1887, and was received in the Subordinate Judge's Court on the 27th. Before the issue of this certificate, plaintiff No. 3 applied for possession of the property decreed to her, and it was given her on the 1st February, 1887.

The Subordinate Judge referred the following questions to the High Court for its decision:—

1. "Whether plaintiff No. 3 is a *vatandár* within the provisions of the Vatan Act, (Bombay) No. III of 1874?

2. "If so, whether the Collector can legally issue his certificate under section 10 of the Act when the service in respect of the *vatan* has become commuted?

3. "If so, whether the certificate can operate in favour of plaintiffs Nos. 1 and 2 beyond the cancellation of the decree?

4. "If so, whether plaintiff No. 3 can be ousted of her possession given to her before the issue of the certificate and properly made over to plaintiffs Nos. 1 and 2, because of it instead of the mortgagee?

5. "Whether the Amending Act (Bombay) V of 1886 can operate retrospectively against plaintiff No. 3, to deprive her of her rights vested in her before the passing of it, by postponing her succession to all the male heirs of the *vatandárs*?"

The Subordinate Judge's opinion on the first point was in the affirmative, and on the second, third, fourth and fifth in the negative.

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SHANKAR GOPÁL v. BABAJI LAKSHMAN.

Mahádev Bháskar Chaubal for plaintiffs Nos. 1 and 2:—The plaintiffs are the rightful heirs of the original mortgagor, their aunt, who was united with them. The Collector rightly issued to them the certificate, and the Civil Court ought to have stopped execution of the decree under section 10 of the Vatandárs' (Bombay) Act III of 1874. Under this Act a female cannot succeed to the *vatan*, and the plaintiff being the daughter of our aunt could not succeed. The *vatan* property is inalienable, whether services are dispensed with or not, and the circumstance that services have been commuted, does not change its nature—*Jagjivandás* v. *Imdád Ali* (1).

Bálájí Ábáji Bhágvat for plaintiff No. 3:—Where services are dispensed with, the *vatan* property is alienable. A daughter is an heir: see section 4 of (Bombay) Act III of 1874. The father of the plaintiff was a *vatandár* and was succeeded by his widow. Section 4 of the Act, as also the amending Act V of 1886, sec. 2, include her in the definition of *vatandár*, though her succession is postponed. My client was a *vatandár*, and the Collector could not issue the certificate under section 10 of the Act, which applies in cases where the property alienated is in the possession of a *vatandár* Here the mortgagee was not a *vatandár*, and the section has no application.

Vásudev Gopál Bhandárkar, for the mortgagee, contended that should the certificate of the Collector be held valid, his client would be entitled to possession.

SARGENT, C. J.:—The effect of the decree of the 21st April, 1887, was to transfer the *vatan* property from the mortgagee to the third plaintiff, who, according to the Collector's certificate, is not a *vatandár* But the mortgagee himself was not a *vatandár*, and under such circumstances we do not think that the decree was within the contemplation of section 10 of (Bombay) Act III of 1874, the object of which was to give practical effect to the prohibition against alienations by *vatandárs* as provided by sections 5 and 7. The Court should, therefore, not act upon the certificate of the Collector, but leave him to take proceedings, if he thinks proper, under section 6, clause 1. Under these circumstances it is not necessary to answer the other questions.

(1) I. L. R., 6 Bom., 211.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

NA'RA'YANDA'S RA'MDA'S, (PLAINTIFF) *v.* SA'HEB HUSEIN, (DEFENDANT).* 1888. *April 9.*

Practice—Minor, suit against—Názir appointed guardian ad litem—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of 1882), Sec. 458—Procedure.

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Názir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the Názir has been unavoidably prevented from making himself acquainted with the case against the minor.

In a suit against a minor residing in a Native State at a distance from the Názir of the Court, who was appointed guardian *ad litem*, and the Názir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay,

Held, that the Court, if it chose, might cancel the appointment of the Názir as guardian *ad litem* under section 458 of the Civil Procedure Code (Act XIV of 1882).

THIS was a reference by Ráv Sáheb Vyankatráv Rukmangad Inámdár, Subordinate Judge of Bijápur, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were stated as follows :—

"One Náráyandás bin Rámdás sued one Gaffur Sáheb, a minor, as the son and heir of Sáheb Husain, the deceased executant of a bond dated 12th September, 1884, to recover Rs. 20 as principal and Rs. 11-14-0 as interest=Rs. 31-14-0, with costs from the estate of the deceased. The bond sued on was said to have been passed at Bijápur, and the cause of action was said to have accrued within the jurisdiction of the Subordinate Judge's Court at Bijápur. The minor defendant is residing with one Chandábi, his sister, in the Miraj State outside British India, and no other person is said to be living in British India who is fit and willing to act as his guardian *ad litem* in this suit. His property is presumably worth less than Rs. 250. On the application of

* Civil Reference, No. 4 of 1888.

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the plaintiff's *vakil* supported by an affidavit, the Názir of the Subordinate Court was, under the circumstances, appointed such guardian under section 456 of the Code of Civil Procedure, and summons was duly served on him He said that as the minor resides with his relatives at Miraj he was not able to obtain any instructions from the latter as to the merits of this case, and that, therefore, he was not in a position to make any defence in this suit."

The questions referred by the Subordinate Judge for the High Court's opinion were:—

1. Whether, under the circumstances mentioned above, the Názir sufficiently represents the minor defendant?

2 If not, what procedure should the Court follow for the purpose of bringing this suit to a trial on the merits?

The Subordinate Judge's opinion on the first point was in the negative. On the second he was of opinion, that a sufficient fee should be levied from the plaintiff, to enable the Názir to put himself in communication with the natural guardians or other friends of the minor for the purpose of obtaining instructions from them, that the fee so levied should be calculated as costs in the suit, and that the amount of fee to be levied should be determined by the Court.

Vishnu Krishna Bhátvadekar for the plaintiff:—The Court has no power to demand fees from the plaintiff. As the Názir has accepted the guardianship, he is bound to obtain all instructions from his ward. He can get the expenses from the minor's estate. The Court may remove the Názir under section 458 of the Civil Procedure Code, and appoint another person to defend the suit.

Vásudev Gopál Bhandárkar for the defendant:—The plaintiff will not be a loser if he pays the expenses, for if he succeeds in the suit he will get them included in the costs. Under the rule of English law, a plaintiff in such a case is called upon by the Court to pay such expenses, and the Court is to make order as to its repayment on decision see Simpson on Infants, p. 464.

SARGENT, C J.—There is no power in the Court to order the plaintiff to pay a fee for the purpose of enabling the Názir, who

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has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends of the minor, but the Court may well and indeed ought to refuse to go on with the suit if it should be of opinion that the Názir has been unavoidably prevented from making himself acquainted with the case against the minor. In the present case, the minor is residing in a Native State at a distance from the Názir, who is thus practically prevented from conducting the minor's defence without incurring expense; the Court might well, under such special circumstances, in the event of the plaintiff refusing to provide the means for enabling the Názir to obtain the necessary information from the minor's relations, cancel the appointment of the Názir (which it is to be remarked is not obligatory on the Court) either in exercise of its inherent power over its own officer or at any rate under section 458 of the Civil Procedure Code, which applies to other causes for removal as well as misconduct.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

JOSHI KA'LIDA'S, PLAINTIFF, *v.* KOLI DA'DA' ABHESANG, DEFENDANT.*

1888. *April* 12.

Bond—Penalty—Stipulation to pay double the amount of debt on default of payment of any instalment.

A stipulation by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, *held* to be in the nature of a penalty.

THIS was a reference by Ráv Sáheb Ranchodlál K. Desái, Subordinate Judge of Umreth, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were stated as follows:—

"The defendant in this suit executed the bond sued on in favour of the plaintiff on the 5th July, 1885, for Rs. 26 Bábáshái, equal to British currency Rs. 22-12-0, promising to pay the same

*Civil Reference, No. 52 of 1887.

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by two equal instalments, the first instalment to be payable on the 4th August, 1885, and the second on the 22nd November, 1885. They agreed to pay jointly and severally double the amount of the said bond, *i.e.* Rs. 52 in British currency, on their failure to pay the instalments or the first instalment regularly on the dates or date specified in the said bond. The obligors did not pay the instalments on the specified dates, but they paid Rs. 17 Bábáshái equal to British currency Rs. 14-14-0, on the 16th July, 1886. Hence the plaintiff brought this suit to recover Rs. 37-2-0 in British currency."

The Subordinate Judge referred the following question to the High Court for its decision:—

Whether the condition in a bond that if the sum of Bábáshái rupees, for which it was passed, be not paid on the dates specified therein, double the amount thereof in British currency rupees shall be payable by the obligor to the obligee is a penalty? and if so, can it be enforced?

The Subordinate Judge was of opinion, that the condition was a penalty, and that it could not be enforced.

Gokuldás Kahándás, for the plaintiff, contended that the stipulation was not in the nature of a penalty, and cited *Baij Náth Singh* v. *Sháh Ali Hosain* (1).

Vishnu Krishna Bhátvadekar for the defendant:—The stipulation amounts to a penalty, and should not be allowed—*The Protector Endowment Loan and Annuity Company* v. *Grice*(2). A *vadhi didhi* clause was held to be a penal clause—*Kánji Kamlákar* v. *Gopináth* (3). Here the stipulation goes higher than *vadhi didhi*, and must be disallowed.

SARGENT, C. J.:—We think the Subordinate Judge was right in holding that the stipulation, by which on default of payment of one instalment double the entire amount of the debt was to become at once payable, was in the nature of a penalty. The mere acceleration of payment of the debt would not have that effect, but the enhancing the amount of the debt (in this case

(1) I. L. R., 14 Calc., 248. (2) 5 Q. B. Div., p. 592.
(3) Printed Judgments for 1875, p. 104.

amounting to more than 100 *per cent.*) ought, we think, to be so regarded, as shown by the remarks of the Court in *Sterne* v. *Beck*(1) and *The Protector Endowment Loan and Annuity Company* v. *Grice* (2).

(1) 1 De G., J. & S., p. 595. (2) 5 Q. B. Div., p. 592.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt, Chief Justice, and Mr. Justice Nánábhái Haridás.

KESHAV GOVIND JOSHI, PLAINTIFF, *v.* JAMSETJI CURSETJI, DEFENDANT.*

1888, *April* 23.

Pleader and client, costs between—Act I of 1846, *Sec.* 6—*Quantum meruit.*

In a suit brought by R. in *formâ pauperis* against the defendant he had engaged the services of the plaintiff as his pleader, but no express agreement for the remuneration of the plaintiff was made. The suit was numbered, and, after the evidence on either side had been gone into, the trying Court made an order dispaupering R. On an application by R., who offered to pay the court-fees, the High Court under its extraordinary jurisdiction made an order directing the lower Court to receive the fees and to proceed with the suit. R. paid the fees, but the suit was compromised. The plaintiff did not attend to the suit after remand. The plaintiff having sued the defendant for his fees, the Subordinate Judge was of opinion that one-fourth fee under section 6 of Act I of 1846 should be awarded to the plaintiff. On reference to the High Court,

Held, that the plaintiff was entitled to a *quantum meruit*, which was to be determined with reference to all the circumstances of the case—there being no express agreement in the case.

THIS was a reference by Ráv Bahádur Chunilál Mánekiál, First Class Subordinate Judge of Thána, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were stated as follows:—

"The plaintiff brought this suit in the First Class Subordinate Judge's Court at Thána, to recover his fees in Suit No. 388 of 1885, which was brought in the same Court in *formâ pauperis* by one Ratanbái against the present defendant, who had engaged the plaintiff as a pleader in that suit. No express agreement for the plaintiff's remuneration was alleged to have been made.

*Civil Reference, No. 1 of 1888.

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The said suit, No. 388 of 1885, was numbered and registered as a regular suit. Evidence on both sides had been gone into, but the final decision of the Court was under section 414, Civil Procedure Code, and the plaintiff was ordered to be dispaupered. The plaintiff then applied to the High Court under its extraordinary jurisdiction, and offered to pay the requisite court-fees. The High Court reversed the order of the Subordinate Court and remanded the case, with directions to levy the requisite court-fees. The plaintiff paid the court-fees, but the suit ended in a *rásináma*. The present plaintiff had not attended to the case after the remand."

The question referred by the Subordinate Judge for the High Court's decision is—

Whether, under the circumstances above stated, the plaintiff is entitled to his full fees, or only to one-fourth of the fees?

The Subordinate Judge was of opinion that the plaintiff is entitled to only one-fourth fees under Act I of 1846, the suit not having been decided on its merits.

Shivrám Vithal Bhandárkar for the plaintiff:—The plaintiff is entitled, under the circumstances of this case, to full fees. There is no rule what fees a pleader should charge. The rule of law applies where the parties are to be charged with costs of a suit. See *Gángji Vithal* v. *Sitárám Shridhar* [1].

Vishnu Krishna Bhátvadekar for the defendant.

SARGENT, C. J.:—The Subordinate Judge is wrong in thinking that the pleader is only entitled to one-fourth fee under section 6 of Act I of 1846—*Gángji Vithal* v. *Sitárám Shridhar* [1]. The pleader, in the absence of an agreement, is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. The Court in assessing the *quantum* may be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where the circumstances of the case would render it unjust to do so. See the judgment in the above case and authorities referred to.

[1] 9 Bom. H. C. Rep., 33.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr Justice Nánábhái Haridás.

TA'RA'CHAND, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SUKLA'L AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS * 1888. *April* 18.

Champerty—Agreement to divide property after litigation if successful—Furnishing money under such agreement

An agreement to furnish money for litigation on the terms of sharing the property to be recovered thereby, is not necessarily void in India, unless accompanied by circumstances which lead to the conclusion that it was not a "*bonâ-fide* one for the acquisition of an interest in the subject matter of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive."

THIS was a second appeal from a decision of J. B. Alcock, Assistant Judge of Khándesh, confirming the decree of Ráv Sáheb K. N. Pátankar, Subordinate Judge of Bhusával.

The plaintiff claimed, as assignee of the equity of redemption of Rámji and Sakhárám, to redeem a plot of ground alleged to have been mortgaged by Ramji and Sakhárám's father to the first defendant in 1863.

The deed of sale, on which the plaintiff founded his claim, was, as stated by the Assistant Judge in his judgment, "an agreement to furnish money for litigation on terms of sharing the property recovered."

The Court of first instance rejected the plaintiff's claim.

The plaintiff appealed to the Assistant Judge, who confirmed the lower Court's decree with the following remarks:—

"* * * * In the present case, however, the purchase is without consideration and champertous. The alleged consideration for the appellant's deed of sale consists of the amount of the mortgage to Sukal *plus* Rs. 100 in cash. The vendor Rámji states that the appellant retained Rs. 75 for purposes of litigation and that it was agreed, when the mortgaged ground had been redeemed, it should be equally divided amongst the parties to the deed I think that the Subordinate Judge was right in holding

*Second Appeal, No. 505 of 1886

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TÁRÁCHAND v. SUKLÁL.

that this is not a genuine purchase of the equity of redemption, though he has not expressed himself either clearly or accurately in saying that the agreement is against morality or public policy. The so-called deed of sale is nothing but an agreement to furnish money for litigation on terms of sharing the property recovered, and is, therefore, void * *."

The plaintiff preferred a second appeal to the High Court.

Inverarity (*Vásudev Gopál Bhandárkar* with him) for the appellant:—The doctrine of champerty has been wrongly applied. Such a transaction, as this, is not void. It is not opposed to public policy or immoral. The agreement to pay off the mortgage-debt is a good consideration for the bond in question. It is not denied that the property is redeemable. The doctrine of champerty and maintenance has been held not to apply to India without proof of corrupt and improper motive in supporting litigation to the annoyance and disturbance of peace of families—*Chedambara Chetty* v. *Renga Krishna*(1); *Rám Coomár Coondoo* v. *Chunder Canto Mookerjee*(2); *Abdool Hakim* v. *Doorga Proshád Banerjee*(3).

Farran (*Ghanashám Nilkanth Nádkarni* with him) for the respondents:—The property sought to be redeemed had been mortgaged with a *gahán-lahán* clause, and the respondents have spent a considerable amount of money over it. It would, therefore, be hard to allow it to be redeemed. The mortgagors allege that they have been cheated by the appellant. The whole transaction, therefore, is suspicious and should not be recognized.

SARGENT, C. J.:—Both the Courts below, apparently following the strict English law, have held the agreement to be void, on the ground that it was one to furnish money for litigation on the terms of sharing the property recovered. Such a transaction, however, is not necessarily void in this country, unless accompanied by circumstances, which, in the language of the Privy Council in *Chedambara Chetty* v. *Renga Krishna*(1) and *Rám Coomár Coondoo* v. *Chunder Canto Mookerjee*(2), lead to the conclusion that it was not a "*bonâ-fide* one for the acquisition of an interest in

(1) L. R., 1 Ind. Ap., 241. (2) L. R., 4 Ind. Ap., 23; I. L. R., 2 Calc., 233.

(3) I. L. R., 5 Calc., 4.

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the subject of litigation, but an illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive". In *Abdool Hákim* v. *Doorga Proshád Banerjee*[1] the application of this test is considered, and the judgment may perhaps be of assistance to the Courts below in determining whether the agreement in the present case was contrary to "good policy and justice" in the sense in which that expression is used by the Privy Council in the cases above referred to. We must, therefore, reverse the decree of the Court below, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

Decree reversed.

[1] I. L. R., 5 Calc., 4.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* J. GRANT.*

1888.
April 30.

European British subject—Privilege—Waiver—High Court—Jurisdiction of High Court over European British subjects in Sind—Code of Criminal Procedure (Act X of 1882), *Secs.* 4, *Cl.* (i), 453 *and* 454—*Bombay Act XII of* 1866.

Where a European British subject waives his right to be dealt with as such by the Magistrate before whom he is tried, he thereby loses all the benefits of the special procedure provided for him under Chapter XXXIII of the Code of Criminal Procedure (Act X of 1882), including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code in cases other than those against European British subjects in the place where he is tried.

The definition of "High Court" in section 4, clause (*i*), of the Code of Criminal Procedure (Act X of 1882) must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter.

If, therefore, in any particular case, the special rules contained in Chapter XXXIII of the Code cease to have any application, the definition of "High Court" in the former part of section 4, clause (i), ceases also to have any application to such a case. The definition in the latter part of the section then prevails, and the case falls within the category of "other cases" to which that part of the section applies.

* Review, No. 58 of 1888.

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QUEEN-EMPRESS v. J. GRANT.

The accused, a European British subject, was tried before the City Magistrate of Karáchi and convicted of criminal breach of trust under section 409 of the Indian Penal Code, and sentenced to six months' simple imprisonment.

At the trial, he waived his right to be tried as a European British subject.

Held, that the accused was not subject to the revisional jurisdiction of the High Court. The accused not having been tried under the special procedure laid down for the trial of European British subjects, the Sadar Court in Sind, which, under Bombay Act XII of 1866, was the highest Court of appeal in all civil and criminal matters in Sind, had the revisional powers of a High Court in the present case by virtue of the latter part of section 4, clause (*i*), of the Code of Criminal Procedure.

THE accused, James Grant, was tried before Francis Gibbon, City Magistrate of Karáchi, and convicted of criminal breach of trust under section 409 of the Indian Penal Code (Act XLV of 1860), and sentenced to six months' simple imprisonment.

At the trial the accused waived his privilege to be dealt with as a European British subject.

On a review of the Magistrate's criminal return, which was forwarded by the Judge of the Sadar Court in Sind "as the return of the trial of a European British subject," the High Court sent for the record and proceedings of the case, and considering that the sentence appeared to be inadequate as well as illegal, issued a notice to the accused, under section 439 of the Code of Criminal Procedure (Act X of 1882), to show cause why the conviction and sentence should not be reversed and why he should not be committed to the High Court for trial.

The case was argued before Birdwood and Parsons, JJ.

Inverarity for the accused:—The High Court has no jurisdiction to revise the proceedings in this case. The accused waived his right to be tried as a European British subject. He, therefore, lost all the benefit of the special procedure laid down in Chapter XXXIII of the Code of Criminal Procedure (X of 1882). That chapter does not oust the ordinary Criminal Courts of jurisdiction. It confers on a European British subject a privilege to be tried by a certain class of Courts and by no others. Such a privilege may be waived by the accused. And when it is waived, he is amenable to the jurisdiction of the ordinary tribunals.

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In the present case, the accused, having waived his privilege, must be taken to have been tried under the general provisions of the Code. The only Court, therefore, that can revise the proceedings of this case is the Sadar Court in Sind, which, under Bombay Act XII of 1866, is the highest Court of appeal in civil and criminal matters in Sind. That Court for the purposes of this case falls within the definition of the term 'High Court' as given in section 4, clause (i), of Act X of 1882. This Court has, therefore, no jurisdiction to revise the proceedings of the Court below. Refers to the ruling *In the matter of the petition of Quiros*[1].

BIRDWOOD, J.:—We called for this case on a review of the Karáchi City Magistrate's criminal return for January last, which was forwarded to us by the Judge of the Sadar Court in Sind as the return of the trial of a European British subject. On an examination of the record and proceedings, the sentence passed by the City Magistrate appeared to us to be inadequate, and if the accused could be regarded as a European British subject, it would have been illegal. We, therefore, issued a notice to the accused, under section 439 of the Code of Criminal Procedure, to show cause why the conviction and sentence should not be reversed, and why he should not be committed to the High Court for trial

It is argued by Mr. Inverarity, the learned counsel for the accused, that as he did not claim at the trial to be dealt with as a European British subject, he cannot now be regarded as such; and that as the offence was committed in Sind, where the highest Court of criminal appeal or revision is the Sadar Court, the case falls under the general rules of the Code of Criminal Procedure, and not under the special rules contained in Chapter XXXIII; and that, therefore, the High Court at Bombay has no jurisdiction to review the case under Chapter XXXII. The decision of the Calcutta High Court in the case of *Quiros and another*[1] is relied on in support of this argument. In that case, Quiros and Maunders and several others, all European British subjects, were charged with rioting and violence before an Assistant Magistrate vested with the powers of a Magistrate of the Second Class

[1] I. L. R., 6 Calc., 83.

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only. Under section 72 of the Code of Criminal Procedure of 1872, they were triable only by a Magistrate of the First Class, who was also a Justice of the Peace. Before putting them on their trial, the Second Class Magistrate asked each of them whether he objected to be tried by him. He did not, however, inform them that, under section 72, he had no jurisdiction, and that they were triable only by a Magistrate of a higher class. None of the accused objected; and the trial proceeded and ended in their conviction. Quiros and Maunders applied to the High Court to quash the proceedings, on the ground that the Magistrate had no jurisdiction to try European British subjects. The High Court quashed the proceedings, on the ground that the Magistrate, before asking the applicants whether they waived their right to be dealt with as European British subjects, did not inform them of the particular right given them by section 72 of Act X of 1872. In disposing of the case, Jackson and Tottenham, JJ., expressed their opinion (at p. 86) as to the proper construction of section 72 of that Act, and also of section 84, which corresponds to section 454 of the Code of 1882. They held that the provisions of section 72 constituted in fact a privilege—"that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the European British subjects a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables them to give up." As to the waiver referred to in section 84, the learned Judges observe (at p. 87) that it "must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has; and the words 'dealt with before the Magistrate' mean everything contained in this chapter,—that is to say, the tribunal having cognisance of the case, the procedure, and also the punishment to which he would be liable." That is a construction which we are prepared to adopt as a proper construction of section 454 of the present Code; but it does not sufficiently meet the difficulty which arises in the present case with reference to the definition of the expression "High Court" contained in section 4, clause (*i*), of the Code. By waiving his right to be dealt with as a European British subject before the City Magistrate, the accused in the

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present case would have no right, in an appeal or an application for revison, to complain that the City Magistrate had exceeded the powers given him by section 446 of the Code by sentencing him to more than three months' imprisonment; for section 454 expressly bars any such complaint "in any subsequent stage" of the case. No right that the accused might have asserted under Chapter XXXIII can now be asserted by him in any Court. But the question before us is, whether, by waiving his right to be dealt with as a European British subject before the City Magistrate, he can now practically oust this Court of the jurisdiction which it would otherwise have possessed under Chapter XXXII of reviewing the City Magistrate's proceedings, and can practically clothe the Sadar Court in Sind with such jurisdiction. Under Bombay Act XII of 1866, that Court is the highest Court of appeal in civil and criminal matters in Sind within the meaning of the Code; and as such it would have the revisional powers of a High Court in the present case by virtue of the latter part of the definition in section 4, clause (*i*), of the Code if the definition in the former part of that clause is affected by the provisions of Chapter XXXIII, and especially of section 454. If the definition is not affected by section 454, then the proceedings in the present case, being admittedly against a European British subject charged with an offence committed in the Bombay Presidency, the expression "High Court," as used in Chapter XXXII, would necessarily be construed, in reference to those proceedings, as meaning the High Court at Bombay. There is an obvious inconvenience in making the jurisdiction of the superior Courts depend, in any particular class of cases, upon the will of accused persons. Chapter XXXIII of the Code, moreover, concerns itself mainly with the appointment of proper tribunals of original jurisdiction for the trial of European British subjects, the appointment of an appellate tribunal in certain cases being provided for in proviso (*b*) to section 408. As no reference is expressly made to revisional proceedings in Chapter XXXIII, this Court would not readily adopt a construction of section 454 which would oust its jurisdiction in any case. It is not without hesitation, therefore, that we have been led in the present case to adopt the view of the law contended for by Mr. Inverarity.

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We think that the definition in section 4 must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter. The intention of the Legislature was not, we think, to recognise an existing inherent jurisdiction in the Presidency High Courts or to confer a future exclusive jurisdiction on these High Courts over all European British subjects liable to criminal proceedings in any part of a presidency. If that had been the intention, it would have been stated in express language in some part of the Code other than that reserved for mere preliminary matters. The provision would probably have found a place in Chapter XXXIII itself, or at all events in the chapters relating to appeal and revision. As we find no such express provision in the body of the Code, though a chapter is expressly devoted to proceedings against Europeans and Americans, the reference in section 4 (i) to "proceedings against European British subjects" must be understood as made to proceedings against European British subjects as such, for which special provision is made in Chapter XXXIII. If, therefore, in any particular case, the special rules contained in Chapter XXXIII cease to have any application, the definition of "High Court" in section 4, clause (i), ceases also to have any application to such case. The definition in the latter part of section 4, clause (i), then prevails; and the case falls within the category of "other cases" to which that part of the definition applies; and if the case is one tried in the province of Sind, the High Court, in reference to the proceedings in it, would be the Sadar Court in Sind. It is not unreasonable to hold that it was the intention of the Legislature, when providing a special procedure in cases against European British subjects, to treat that procedure as strictly exceptional. Where it was to be applied it was to be binding on certain Courts and chains of Courts, including the highest Courts of appeal and revision. Where it was not applicable,—that is, where the right to it might be waived,—the ordinary rules of procedure applicable to other cases in the Courts ordinarily having jurisdiction in them were to prevail. Where a European British subject waives his right to be dealt with as

such by the Magistrate before whom he is tried, he "shall not assert it in any subsequent stage of the same case." He thereby loses all the benefits of the special procedure provided for him, including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code, in cases other than those against European British subjects, in the place where he is tried. As the accused in the present case waived his rights as a European British subject, he would not have the right to ask us to review the proceedings in his case: and we have not the right to interfere.

The record and proceedings should, therefore, be returned to the City Magistrate with a copy of our judgment. A copy should also be furnished to the Judge of the Sadar Court.

PARSONS, J.:—I concur in holding that we have no jurisdiction to revise the proceedings of the Magistrate in this case. The High Court of Judicature at Bombay is, under the Code of Criminal Procedure, so far as the province of Sind is concerned, a High Court only in reference to proceedings against European British subjects, or persons jointly charged with European British subjects—section 4 (*i*). The meaning of the term European British subject is defined in clause (*u*) of the same section. Chapter XXXIII of the Code treats of criminal proceedings against Europeans (including European British subjects) and Americans. It is clear that the intention of the Legislature in enacting that chapter was to confer upon a particular class of persons a privilege which each such person might claim or waive at his option; and although the chapter is neither so explicit when read with the rest of the Code and with some other Acts, nor so well arranged as might have been expected, the intention, I think, has been attained, so that it can be given legal effect to; for if sections 443 to 452 are passed over as relating to procedure after the commencement of the actual proceedings, and sections 453 and 454 (which ought really to come first as dealing with the very commencement of the proceedings), are considered, it will be seen that they provide the following procedure, *viz.*, that when a person is brought before a Magistrate charged with an offence, the

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Magistrate shall, unless he has reason to believe that that person is not a European British subject, ask him whether he is such a subject or not. If the person replies that he is a European British subject and claims to be dealt with as such, the Magistrate shall inquire into the truth of the statement, and shall then decide whether he is or is not a European British subject; and shall deal with him accordingly,—that is to say, he shall apply to the case the special provisions which regulate criminal proceedings against European British subjects, and which have been previously set out in sections 443 to 452. In such a case the proceedings would be proceedings against a European British subject. If, on the other hand, the person replies that he is not a European British subject, or that, being such a subject, he does not claim to be dealt with as such, or if the claim is made and the grounds of such claim are not proved, the Magistrate shall deal with him accordingly,—that is to say, he shall apply to the case the provisions of the Code which regulate ordinary enquiries and trials. In such a case, the proceedings would not be proceedings against a European British subject.

In the case at present before us the proceedings fell under the latter category; for, although the Magistrate did not, as he ought to have done, ask the accused, when he was first brought before him on the 16th December, whether he was a European British subject, the accused himself on the 3rd January waived any claim he might have to be dealt with as such; and this waiver must be held to relate back to the commencement of the proceedings, more especially as there is no decision by the Magistrate on the record that the accused is a European British subject. It may perhaps be said that the effect of this decision will be to place a different meaning on the term "European British subject" to that given in section 4, clause (*n*) of the Code, but really this is not so. Before a person can be held to be a European British subject, he must prove that he comes within the terms of that definition, and to do this, it is necessary that he both make the claim and establish it. There can be no such *status* without a claim and a decision that it exists. In the present case no such claim has been made and no such decision has been passed. There is nothing, therefore, to show that the *status* of a Euro

pean British subject exists, and that the accused comes within the terms of the definition of such a subject as is given in section 4 of the Code. The proceedings, therefore, not being proceedings against a European British subject, have been wrongly entered as such in the returns sent to this Court by the Courts in Sind, and must be returned to the Magistrate (who for the purposes of this trial had needlessly styled himself a 'Justice of the Peace). They are subject to revision, not by this High Court, but by the Sadar Court in Sind, which is the High Court in reference to them.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

MORESHWAR BA'LKRISHNA, (ORIGINAL PLAINTIFF), APPELLANT, *v.* DATTU AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Registration Act III of 1877, *Sec.* 50—*Priority—Possession of mortgagor as tenant to mortgagee—No notice to bond-fide purchaser—Notice.*

By an unregistered deed of sale dated the 1st June, 1881, the first defendant sold to the plaintiff, for Rs. 90, certain land which had been previously mortgaged with possession by him to the plaintiff. The first defendant had remained in possession subsequently to the mortgage as the tenant of the plaintiff under a lease which was not registered. On the 16th April, 1883, the first defendant sold the property to defendant No. 2, who registered his deed, took actual possession of the land, and got it transferred to his name in the revenue books. The plaintiff now sued to recover possession from defendant No. 2, who contended *(inter alia)* that his deed being registered was preferable to the plaintiff's prior, but unregistered, deed of sale. The Court of first instance awarded the plaintiff's claim. The defendants appealed to the District Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court,

Held, confirming the decree of the lower Appellate Court, that defendant No. 2 having registered his deed of the 16th April, 1883, was entitled, under section 50 of Act III of 1877, in priority to the plaintiff, whose deeds were not registered, although earlier in date.

It was contended for the plaintiff that the possession of defendant No. 1 as tenant to the plaintiff subsequently to the mortgage and sale of the land to the plaintiff was the possession of the plaintiff, and that such possession operated as constructive notice of the plaintiff's title to defendant No. 2.

Held, that the possession by defendant No. 1 as mortgagor was not notice to defendant No. 2 of the plaintiff's title. Defendant No. 1 being the vendor of the land to defendant No. 2, the latter could have no reason to suppose that he was in possession otherwise than as owner.

* Second Appeal, No. 275 of 1886.

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THIS was a second appeal from a decision of H. J. Parsons, District Judge of Thána, reversing the decree of Khán Sáheb Ruttonji Mancherji, Subordinate Judge of Murbád.

In 1879 the defendant Dattu mortgaged with possession the land in dispute to the plaintiff for the consideration of Rs. 50, but remained in possession as plaintiff's tenant. On the 1st June, 1881, Dattu sold the land to the plaintiff for Rs. 90, and executed a deed of conveyance, which was not registered. He still remained in possession, as a tenant of the plaintiff, under a lease which was not registered.

On the 16th April, 1883, Dattu sold the land to Devu Patel, (defendant No. 2), for Rs 199, as alleged by Dattu. Devu got his deed registered, and was put into actual possession of the land by Dattu, who also transferred the land to the name of Devu in the revenue books

The plaintiff sued the defendants to establish his title to, and recover possession of, the land. Defendant No. 2 (*inter alia*) contended that his sale-deed being registered was entittled to priority

The Court of first instance awarded the plaintiff's claim.

The defendants appealed to the District Judge, who reversed the lower Court's decree with the following remarks:—

"* * The Subordinate Judge has awarded the claim of the plaintiff, holding that the act of defendant No. 1 in selling his land to defendant No. 2 after he had sold it to the plaintiff was a fraud He finds, however, expressly that defendant No. 2 was not a party to this fraud, and that he was not cognizant and had no notice of the former sale or mortgage or leases. This finding is not objected to. On it, it is clear that the plaintiff is not entitled to possession as against defendant No. 2. * * *. The question is, which purchaser has priority. The law (section 50 of Act III of 1877) gives it to the one who holds a registered document,—that is, to defendant No. 2 in this case. The plaintiff when he took his deeds of mortgage and sale and his leases, and failed to register them or take actual possession of the land, knew the risk he was running, and accepted it, and, therefore, he cannot now complain * * * *."

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The plaintiff preferred a second appeal to the High Court.

Mahádev Bháskar Chaubal for the appellant:—The plaintiff's purchase was prior to that of the defendant, and as it was accompanied by possession it has priority. Possession by a mortgagor is as good as possession by the mortgagee—*Shivlál* v. *Naro Balvant*(1). The registration of the defendant's purchase-deed does not give him priority. Possession by a tenant under a *kabuláyat* is as effectual as actual possession by the landlord —*Wámanji Vishnu* v. *Amba*(2); *Anant Bápu* v. *Arjun Gondji*(3).

The possession of the plaintiff, though constructive, was a notice to the defendant, who ought to have made inquiries as to the title of the vendor.

Vishnu Krishna Bhátvadekar for the respondents:—This case is governed by the Registration Act III of 1887, sec. 50, which gives priority to a registered document over an unregistered document. The defendant's purchase-deed is registered and accompanied by possession, and the land has been transferred to his name in the revenue books. The first defendant was in possession when he sold the property to the second defendant, who had no reason to suppose that it had already been sold. Possession by a tenant cannot amount to notice. The plaintiff ought to have got his deed of sale or the lease registered, in order to fix the defendant with notice. Both the documents, *viz.* that of the plaintiff and that of the defendant, were executed after the Act of 1877 came into force.

SARGENT, C. J.:—Since the passing of the Registration Act III of 1877 the preference given to an unregistered document accompanied by possession (where registration was optional) as against a registered document by the decision in *Bálárám Nemchand* v. *Appa*(4) (as explained by Melvill, J., in *Sambhubhái* v. *Shivlál-dás*(5)), has been taken away by the altered language of section 50 of that Act. That section provides that every document of the kind mentioned in clauses *a*, *b*, *c* and *d* of section 17, if duly registered, shall take effect, as regards the property com-

(1) Printed Judgments for 1882, p. 101 (3) Printed Judgments for 1880, p. 293.
(2) Printed Judgments for 1881, p. 117. (4) 9 Bom. H. C. Rep., 121.
(5) I. L. R., 4 Bom., at p. 92

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prised in it, against every unregistered document relating to the same property. The defendant's purchase, therefore, of the 16th April, 1883, is entitled to priority over the earlier, but unregistered, document on which the plaintiff's title is based, unless indeed the defendant had notice of it, in which case, under the ruling of this Court in *Shivrám* v. *Genu*[1] and *Dundaya* v. *Chenbasápá*[2], he would lose his preference. The plaintiff was not in actual possession, but was constructively so for certain purposes through the mortgagor, who remained in possession as his tenant under a *kabuláyat*, which, however, had not been registered. The mortgagor's possession, however, would afford no notice, either actual or constructive, to the defendant of the plaintiff's title. Finding his intended vendor in possession, the defendant would have no reason to suppose that he was there otherwise than as owner. The plaintiff might have protected himself by having the *kabuláyat* registered; but not having done so, he cannot now contend that the defendant, in the absence of any special circumstances, had notice of the nature of the mortgagor's possession. As the plaintiff's pleader refused at the hearing to have an issue raised to try the genuineness of the defendant's mortgage, this Court in second appeal has no power to rectify his mistake. We must, therefore, confirm the decree, with costs on the appellant.

Decree confirmed.

(1) I. L. R., 6 Bom., 515.

(2) I. L. R., 9 Bom., 428.

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ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

KHURSEDJI RUSTOMJI COLA'H, EXECUTOR OF DOSSIBA'I, WIDOW, (PLAINTIFF), *v.* PESTONJI COWASJI BUCHA', (DEFENDANT).*

Small Cause Court—Jurisdiction—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of 1882, *Sec.* 18.

The plaintiff as executor of D. sued the defendant in the Small Cause Court of Bombay, to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff, that assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the notes.

Held by the High Court that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value.

REFERENCE to the High Court by Mr. Spencer, Acting Chief Judge of the Small Cause Court, Bombay, under section 69 of the Presidency Small Cause Courts Act XV of 1882.

The reference was as follows :—

"1. This is a suit in trover brought by an executor to recover from the defendant two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of the testatrix Dossibái.

"2. The plaint alleges that for some years during the lifetime of the said Dossibái and till her death the defendant was employed as a cook, and during her last illness he had possession of her keys of the cupboards and boxes in her house. That during the said illness of Dossibái, on or about the 19th June, 1886, the said defendant removed from her cash-box or cupboard two Government promissory notes of the value of Rs. 2,000, the pro-

* Small Cause Court Suit, No. 8832 of 1887.

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perty of the said Dossibái. The plaint goes on to state that the plaintiff, as the executor of the said Dossibái, had demanded the return of the notes, but that the defendant had refused to return them, and has set up a false claim to the same, alleging that he had received them by way of gift from Dossibái; and concludes with a prayer for judgment in the sum of Rs. 2,000 as the value of the said notes, or for the return thereof.

"3. The defence was that these notes were given to the defendant on the 19th June, 1886, by the plaintiff by direction of Dossibái, as a reward for his past services. The evidence of the defendant on this point was so very unsatisfactory that I could not rely upon it.

"4. On the other hand, the plaintiff did not adduce any evidence to show that the defendant had removed the notes from Dossibái's box, as in the plaint alleged; that was an inference which it was assumed the Court would draw from the fact of the defendant being in possession of the notes unendorsed; but the testimony of the plaintiff himself, his conduct, and the other circumstances, which I shall presently state, appeared to me to afford some evidence that the notes had been given to the defendant by Dossibái, though not in the manner deposed to by him.

"5. The evidence of the plaintiff was to the following effect:—He stated that on the 19th of June, 1886, he, by desire of Dossibái, opened the box which contained her securities, and made a list of them; this list was put in as an exhibit at the hearing, and it included the two promissory notes, the subject of this suit. Dossibái, though feeble from age, was then in her usual health, and there was no reason to apprehend that her death would take place, as it did, on the 27th of June following. On the 27th June, 1886, the plaintiff again opened the box and made a second list of securities. On that occasion the two notes were missing, and were at once produced by the defendant, who alleged that they had been given to him by Dossibái as a reward for his services. The plaintiff was the residuary legatee under Dossibái's will, and would have been entitled to the notes on her death; he did not, however, immediately accuse the defendant of having obtained possession of the notes dishonestly, but what took place was this.

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The defendant, with the knowledge of the plaintiff went across the road to the house of Dr. Edulji Nussarwánji, a graduate of the Grant Medical College and a Justice of the Peace, who had been in the habit, for years past, of attesting Dossibái's mark whenever she sold or drew interest on her securities, and left a message that the doctor was wanted at Dossibái's house. On his return home, Dr. Edulji went to the house of Dossibái. Dr. Edulji's evidence both parties admit to be beyond impeachment, and is as follows:—'On entering the room in which the lady was lying, I saw the plaintiff and his wife. I asked the plaintiff why I was wanted; he said the defendant wanted two Government promissory notes to be signed by the deceased and attested by me. In the meantime the defendant came in and produced two promissory notes. I began to examine the lady in the presence of the parties. I found her in an exhausted and insensible state, almost in a dying state. I, therefore, said to the plaintiff the lady was not in a fit state to do any business. No complaint was made to me that the notes had come into the hands of the defendant by improper means. No complaint of any sort was made to me. No complaint was made that the defendant had got the notes without the knowledge of the deceased or of the plaintiff. When I said deceased was not in a fit state to transfer the notes, the defendant spoke to the plaintiff, and said that he, plaintiff, was aware of the intention of the deceased to give him those notes, or words to that effect, whereupon the plaintiff said if he could get the lady to transfer the notes he might do so. Dossibái died on the same day, and the notes were allowed to remain in the possession of the defendant. It was not until the 27th of July, 1886, one month after, that the plaintiff by an attorney's letter demanded the return of the notes, and for the first time charged the defendant with having abstracted them from his mistress's box without the consent or authority of his mistress.'

"6. On the facts as above set forth—namely, that the plaintiff, who would have been entitled to those notes on the death of Dossibái, did not, when they were produced by the defendant on the 27th of June, charge him with having fraudulently obtained possession of them, but acquiesced in Mr. Edulji being called to attest Dossibái's transfer of the notes to the defendant, and,

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further, had allowed the notes to remain in his possession, and did not accuse him of fraud until a month afterwards—I held that there was evidence of a gift of the notes to the defendant.

"7. It was then contended that, assuming there was evidence of a gift, the gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and he was not entitled to any aid from the Court to perfect the gift. I held that this Court had no power to declare that the gift was incomplete, and on that ground to decree the return of the notes or payment of their value, and that, so far as the jurisdiction of this Court was concerned, the defendant had a right to retain the notes.

"8. I, therefore, dismiss the suit, subject to the opinion of the High Court on the following question, which I have been asked to state on behalf of the plaintiff:—

"Assuming that there was evidence of a gift, had this Court jurisdiction to pass a decree in favour of the plaintiff for the return of the notes, or payment of their value, on the ground that the gift was incomplete?"

Latham (Advocate General) appeared for the plaintiff.

Jardine and *Viccáji* for the defendant.

The following authorities were cited:—*Rummens* v. *Hare*(1); *In re Richardson*; *Shillito* v. *Hobson*(2); *Barton* v. *Gainer*(3); *In re Hancock*; *Hancock* v. *Berrey*(4); *Bái Jádav* v. *Tribhuvandás Jagjivandás*(5).

SARGENT, C. J.:—This reference arises out of a suit by an executor in the Small Cause Court to recover from the defendant two Government notes, of the nominal value of Rs. 2,000, standing in the name of the testatrix, alleging that the defendant had removed them from the testatrix's box during her illness. The defence set up was that the notes had been given by the testatrix to the defendant as a reward for past services. The Judge of the Small Cause Court says that the defendant's evidence on this point was very unsatisfactory, and that he could not rely on it.

(1) L. R., 1 Ex. Div., 169.
(2) L. R., 30 Ch. Div., 396.
(3) 3 H. & N., 387.
(4) 26 W. R., 710.
(5) 9 Bom. H. C. Rep., 333.

However, he held, upon the whole of the evidence, that there was evidence of a gift of the notes to the defendant; but being of opinion, as it would seem, that he had not jurisdiction to go into the question whether there had been an incomplete gift of the moneys represented by the notes, he held, on the authority of *Burton* v. *Gainer*(1) and *Rummens* v. *Hare*(2), that the defendant had the right to retain the notes.

Those cases are, doubtless, decisions that where there is evidence of a gift to the defendant of the paper writing constituting the security, an action of detinue will not lie at common law in England for the recovery of such paper writing, on the ground that there is an imperfect gift of the moneys which are the subject of the security. In such actions at common law as Lord Cairns points out in *Rummens* v. *Hare*(3) there is no question with regard to the right to the money secured by the paper writing, but for the detention of the paper writing only. However, in a Court of equity the question is regarded from a wider point of view. In *Searle* v. *Law*(4) the plaintiff, who was the holder under an incomplete voluntary assignment of turnpike securities and shares, sought for a declaration that he was beneficially entitled to them, and the Court having found that he was not so entitled ordered him to deliver them up. Again in *In re Richardson; Shillito* v. *Hobson*(5) it was held that the defendant could not retain possession of a title-deed which had been given to him, as it could not be separated from the equitable mortgage created by its deposit, of which there had been no valid and complete gift to the defendant. Lastly, in *In re Huncock; Hancock* v. *Berrey*(6) a mortgagee of a share in a certain sum of consols delivered the mortgage-deed to a third person, intending to make a gift of the mortgage, but which was not completed, and the Court directed the defendant to restore the deed to the representative of the mortgagee.

In the first two of those cases in equity there were special circumstances which may prevent their being regarded as authorities for holding that a Court of equity will, in all cases of an

(1) 3 H. & N., 387.
(2) L.R., 1 Ex. Div., 169.
(3) L. R., 1 Ex. Div., 169
(4) 15 Sim., 95.
(5) L. R., 30 Ch. Div., 396.
(6) 26 W. R., 710.

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incomplete gift, direct documents of title to be handed over to the person beneficially entitled to them. The last decision, however, cannot well be supported on any other ground. Nor is it possible to draw any real distinction between a mortgage-deed in that case and the Government promissory notes in the present one. They are both the documents of title upon which the creditor must rely to enforce his claim—in the one case against his mortgagor, and in the other against Government. We think, therefore, that the plaintiff, in a Court competent to deal with all the rights of the parties, ought to succeed, if there was no complete gift of the moneys secured by the notes.

It was argued, however, that a Court of Small Causes cannot deal with the question in its entirety, as to do so would be virtually to declare the defendant to be a trustee for the plaintiff, thus making a declaratory decree, which is excluded from the competency of the Court by section 19, sub.-cl. (*s*) of Act XV of 1882. But that clause refers to a declaratory decree properly so called, and not to one in which the declaration is merely introductory to the relief sought. Again, it was contended that the jurisdiction of the Small Cause Court is confined to suits where the right sought to be enforced would have been the subject of a suit on the plea side of the Supreme Court. The jurisdiction of the Small Cause Court under the Acts IX of 1850 and XXVI of 1864 was doubtless held to be so limited (except as specially provided by section 32) in *Bái Jádav* v. *Tribhuvandás Jagjivandás*[1]. That conclusion was arrived at on the language of section 25 of the Act of 1850, which gives jurisdiction to the Small Cause Court in suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500. The language of section 2 of Act XXVI of 1864 was more comprehensive, but the Court notwithstanding held that "the object of the Legislature in passing Act XXVI of 1864 was to increase the money limits of the jurisdiction of the Court, not to enlarge the class of suits on which it had jurisdiction. The language, however, of section 18 of Act XV of 1882, which now determines the jurisdiction of the Small Cause Courts, is quite general, and gives jurisdiction to the Courts to try

[1] 9 Bom. H. C. Rep., 333.

"all suits of a civil nature" when the amount or value of the subject-matter does not exceed Rs. 2,000, subject only to the exceptions in section 19, none of which have any application to the present case, which raises only the question whether there has been an incomplete gift of the moneys secured by the notices. We have, therefore, no doubt that the Court of the Small Causes has jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift, and must answer the question referred to us in the affirmative.

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Attorneys for the plaintiff:—Messrs. *Wádia and Ghándy.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinshá.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

HASSANBHOY VISRA'M AND OTHERS, (PLAINTIFFS), v. THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, (DEFENDANTS). *

1888. *August 24.*

Presidency Small Cause Courts Act XV of 1882, Sec. 38—Re-hearing—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice.

On an application for a re-hearing by the High Court, under section 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court,

Held by the High Court that the evidence being of a very conflicting character, and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused.

Section 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed the inclination of opinion.

APPLICATION for a re-hearing under section 38 of the Presidency Small Cause Courts Act XV of 1882.

The plaintiffs filed this suit in the Court of Small Causes, Bombay, to recover from the defendants Rs. 2,000 as damages alleged to have been sustained by them to 1,300 bags of Mauritius

* Small Cause Court, No. $\frac{44}{4870}$ of 1888.

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sugar shipped by them on board the defendant's steamer "Byculla" at Rangoon, on carriage to Bombay, by reason of "wet timber being stowed in the same hold as the plaintiffs' said sugar."

The suit came on for hearing before the Chief Judge of the Small Cause Court on the 19th and four following days of July, and on the 13th August His Honour gave judgment for the plaintiffs for Rs. 2,000 and costs, on the ground that the steamer's hold, into which the plaintiffs' sugar was lowered, was wet by the water brought on board by certain timber, and that consequently the defendants had failed to provide a vessel reasonably fit to carry the sugar.

The defendants filed a petition to the High Court, praying for a re-hearing of the case under section 38 of the Presidency Small Cause Courts Act XV of 1882. Their petition concluded as follows:—

"9. That your petitioners feeling themselves aggrieved by the said judgment, and being in a position to produce further evidence in support of their defence, are desirous that this suit should be re-heard by this Honourable Court, under section 38 of Act XV of 1882 of the Legislative Council of India, on the following grounds:—

"(*a*) That the learned Judge erred in holding the sugar was damaged by being lowered on to the floor of the hold of the steamer when the same was wet with the water brought on board by the timber, and that, therefore, your petitioners had failed to provide a ship reasonably fit for the carriage of the said sugar. Your petitioners submit that it was conclusively proved that the S. S. "Byculla," although containing only one hold, was in every respect fit for the carriage of general cargo, consisting *(inter alia)* of timber and sugar, and that the said steamer had often previously carried a mixed cargo of timber and rice without any damage having been caused to the rice, which is a species of cargo specially liable to be damaged by water. That there was no evidence whatever given to show that the sugar had, as a matter of fact, been lowered on to the wet floor of the steamer.

"(*b*) That the learned Judge ought to have held that the said sugar was not in a sound and dry condition when it was shipped,

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and that the damage hereto was caused either by atmospheric influences operating upon it during the year that it remained at Rangoon, or by its having been originally shipped at Mauritius in a green and unsound state, and that such damage was in no way occasioned by any thing which occurred after it had been received on board the defendants' steamer.

"(c) That the learned Judge decided against the weight of evidence, and that he either overlooked or did not give due weight to certain parts of the defendants' evidence—notably the evidence which was uncontradicted, and which showed that a shipment of the same sugar which arrived in Bombay from Rangoon by the defendants' steamer 'Nevása' about a month after the arrival of the 'Byculla' was found to be in precisely the same condition as the sugar in question, notwithstanding that no timber was carried by the steamer 'Nevása' and that no part of her cargo was damaged except such sugar. Also the evidence, also uncontradicted, which conclusively proved that although the said S. S. 'Byculla' carried 27,110 bags of rice, and although large quantities of such rice were stowed in immediate proximity to the timber, yet none of it was at all damaged, except a small quantity, which was admittedly damaged by a totally different cause. Also the evidence given by two of the most experienced European surveyors of sugar in Bombay, who subjected the sugar on its arrival in Bombay to a very careful examination, and declared that it could not have been damaged whilst on board the steamer. Also the evidence which showed that a majority of the bags were not Mauritius sugar bags, but were what are called Calcutta rice bags, and were of a precisely similar description to the bags in which rice shipped by the plaintiffs by the same steamer was contained, thus showing, as your petitioners contend, that a majority of the outer bags of the sugar were removed in order to conceal the traces of the damaged condition of the sugar at the time of shipment.

"(d) That the learned Judge ought to have held that if the damage was occasioned by improper stowage, your petitioners were protected from liability by the terms of the bill of lading or at any rate he should have held that your petitioners were responsible only for such damage as was proved to have arisen after the

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sugar was received on board and before the steamer commenced her voyage, but not in any case for any damage which arose after the commencement of the voyage.

"(e) That the learned Judge erred in holding that no mate's receipt was given to the shippers at the time of shipment of the sugar. Your petitioners submit that it is conclusively proved, by the evidence of the captain and officers of the steamer, that the mate's receipt was handed to the plaintiffs' man at the time of shipment, and that he subsequently brought it back to the steamer on account of some dispute about the number of bags shipped. What became of it afterwards there is nothing to show. That the captain parted with the original mate's receipt, is shown by the fact that at the instance of the plaintiffs he was requested to forward, and that he did forward to Rangoon from Akyab whilst the steamer was proceeding on her voyage, a duplicate of the said receipt bearing the same remark as to the condition of the bags as appears on the bill of lading and as is proved to have been written upon the original mate's receipt.

"(f) That his Honour also erred in holding that even if the mate's receipt had been delivered to the shippers on shipment of their sugar, the contents of the bill of lading could not have any retrospective effect, although such receipt showed that the cargo was received subject to the conditions in the company's form of bill of lading.

"(g) That his Honour ought to have held that the exceptions and conditions in the bill of lading related back to the point of time when the contract for shipment was made, or at any rate at the time when the goods were received on board.

"(h) That his Honour erred in holding that the exceptions in the bill of lading about re-exported goods and the written clause at the foot thereof amount to not being more than a qualification of the words 'shipped in good order' so as to throw on the plaintiffs the burden of proving that the sugar in question was in good order; your petitioners submit that these words amount to a contract that they shall in no case be held responsible for the condition of the sugar.

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"(*i*) That his Honour ought to have held that the *onus* of proving that the sugar was in a sound and dry condition at the time of shipment lay upon the plaintiffs and that they had failed to prove that their sugar when shipped was in good condition."

Inverarity appeared for the petitioners.

SARGENT, C. J.:—This was an application for a re-hearing under section 38 of the Small Cause Courts Act of 1882. The grounds set out in the affidavit, by which it was supported, were that the decision of the Small Cause Court was opposed to the weight of evidence and also contrary to law. The Legislature has not given an appeal to the High Court in all cases in which the value of the subject-matter exceeds one thousand rupees, but by section 38 it has provided for an application being made *ex parte* on affidavit for a trial of the cause by the High Court, and which the Court is directed to grant (on such terms as it thinks fit) if it "is of opinion that there has been a miscarriage or failure of justice." It must be at once conceded that the term "opinion" does not necessarily imply "conviction." It can scarcely be better defined than in the words of Hale, to be found in Webster's Dictionary, as "that assent of the understanding which is so far gained by evidence of probability that it rather inclines to one persuasion than to another, yet not without a mixture of uncertainty or doubting." This leaves the question open as to the strength of the opinion to be entertained by the Court as a condition of granting the application, but it obviously excludes that state of mind in which a Judge merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. That is what the section expressly requires the Court to do. And, further, we cannot doubt that it was intended it should be a distinct opinion, and not what is termed the inclination of opinion. Having granted the Presidency Small Cause Court jurisdiction to try civil suits up to Rs. 2,000, and not having given an appeal to the High Court, the Legislature must be presumed to have intended that the decision of the Small Cause Court should stand, unless the High Court should upon affidavit form a distinct opinion that there had been a miscarriage of justice. This view

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of the section becomes very important in considering an application for re-hearing, on the ground of the decision being against the weight of evidence. In the present case the Judge of the Small Cause Court, as appears from the judgment, has given greater weight to the direct evidence as to the sugar when it was shipped, and the condition of the floor of the ship and the proximity of the wet timber already shipped to the sugar, than to the inference sought to be drawn by the defendants from the fact of the sugar having been lying in a godown in Rangoon for several months and from the arrival of other sugar in the same state shipped in another vessel under similar circumstances except as to the condition of the floor, and, lastly, to the opinions of experts that the state of the sugar was not due to the causes relied on by the Court. The evidence, so far as it appears from the judgment and the statements in the affidavit, was of a very conflicting character, and certainly not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong so as to enable this Court to order a re-hearing on the ground of the decision being contrary to the weight of evidence. As to the objection that there was a clause in the bill of lading which relieved the defendants from any responsibility on account of the condition of the sugar, it was scarcely contended that it could apply when the injury to the sugar was caused, as found by the Judge, by the defendants not providing a ship in a reasonably fit state to carry the cargo. We must, therefore, refuse the application.

Application refused.

Attorneys for the petitioners (defendants):—Messrs. *Craigie, Lynch, and Owen.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

ANUPCHAND HEMCHAND, (PLAINTIFF), *v.* CHA'MPSI UGERCHAND, (DEFENDANT).*

1888, *August* 17.

Evidence—Evidence Act I of 1872, Sec. 92, Proviso 1—Contract—Wagering contract—Bombay Act III of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.

In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, and that the contract was, therefore, void.

Held that oral evidence was admissible to prove the defence set up by the defendant.

THIS was a reference to the High Court by Mr. Spencer, Acting Chief Judge of the Small Causes Court of Bombay, under section 69 of the Presidency Small Cause Courts Act XV of 1882. The learned Judge stated the case as follows :—

"This is a suit brought to recover from the defendant the sum of Rs. 543-6-0 under the following circumstances :—

"2. On the 2nd of November, 1886, the defendant by an agreement in writing made through a broker, copy translation of which is annexed and marked A, (*see note*) contracted to sell to the plaintiff fifty full-pressed bales Broach ginned good class cotton of the crop of the year 1943 at the price of Rs. 204-8-0 *per khandi* deliverable between the 15th and 25th of March 1887. A counterpart of A, signed by the plaintiff, was given to the broker who negotiated the contract, for delivery to the defendant, and was produced by his counsel at the hearing.

"3. The plaintiff in his evidence stated that the price of the above description of cotton continued to rise after the contract

* Reference from the Court of Small Causes, Suit No. 8275 of 1887.

Note (Contract A).—"To Sá Motilál Sákulchand written by Sá Karamchand Chapsi. To wit. I have agreed to purchase from you fifty *paki* (full-pressed) bales of new Broach ginned good class cotton of the crop of the *Samvat* year 1943. The price thereof is at the rate of Rs. 227½ *per khandi*, less 5½ *per cent.* rebate. As to the fixed time for delivery thereof, I am duly to receive the same in full from the 15th day of March in year 1887 up to the 25th day of March. Through the broker Lalluchand Dongarsi. *Samvat* 1943, 9th *Fálgun Vud*, Friday, 18th March 1887."

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was made, and that, some days after the time for delivery, one Wastárám called on him on behalf of the defendant, and stated that the defendant's cotton was not likely to arrive in time and asked him to settle contract (A) at the bázár rate. The plaintiff expressed his willingness to do so through a broker, and on the 18th March, 1887, he agreed through a broker, Lalu Dongar, to settle the difference in price at Rs 227-8 *per khandi*. The broker thereupon brought him an agreement signed by the defendant, whereby he contracted to purchase from the plaintiff the same quantity and description of cotton deliverable on the same dates at Rs. 227-8 *per khandi*. Copy translation of the agreement is annexed and marked (B) (*see note*). A counterpart of this second agreement signed by the plaintiff was delivered to the defendant by the broker, and was produced by the defendant's counsel at the hearing. The plaintiff further stated that if he had not been asked to settle contract (A), he would have insisted on the cotton being delivered on due date. The plaintiff by his summons claimed the difference between the two rates of Rs. 204-8 and Rs. 227-8 *per khandi*, at which he had agreed to buy and sell the cotton.

"4. No evidence was called on behalf of the defendant to contradict the evidence of the plaintiff, but it was contended by his counsel (1) that agreement (A) was a wagering contract; that the parties never did intend to give or take delivery of cotton, but to pay the difference in price, and that it was, therefore, void under section 30 of the Indian Contract Act; and (2) that there was no evidence that the defendant had agreed to pay the damages claimed—agreement (B) being unambiguous in its terms, and oral evidence not being admissible to connect it with agreement (A).

"5. For the reasons given in my judgment, copy of which is annexed, and on the authority of the case there cited—*Jugger-*

Note (Contract B).—To Sá Motilál Sákulchand written by Sá Karamchand Chapsi. To wit. I have agreed to deliver to you fifty *pakí* (*i. e.* full-pressed) bales of new Broach ginned good class cotton of the crop of the *Samvat* year 1943. The price thereof is at the rate of Rs. 204½ *per khandi*, less 5½ *per cent.* rebate As to the fixed time (for delivery) thereof, it is to be duly delivered in full from the 15th March, 1887, up to the 25th March. Through the broker Sá Ratanchand Sáváionand. The 2nd November, 1886. The 6th *Kartuk Sud*, 1943.

nauth Sew Bux v. *Rám Dyál*[1]—I refused to admit oral evidence, which was tendered to show that agreement (A) was intended to be a wagering contract, and I also held there was evidence that the defendant had agreed to pay to plaintiff the difference between the rates in agreements (A) and (B.)

"6. I, therefore, gave judgment for the plaintiff; but on the application of the defendant's counsel that judgment is contingent on the opinion of the High Court on the following questions:—

"*First.*—Was oral evidence admissible for the purpose of showing that agreement (A) was a contract by way of wager?

"*Second.*—Was oral evidence admissible for the purpose of showing that agreement (B) was intended to operate by way of a settlement of the damages which would become due to the plaintiff by the non-fulfilment of the first agreement?

"7. If the High Court should be of opinion that I was in error in refusing to take evidence on the first point, I request that the case may be remitted to this Court for the purpose of taking such evidence."

There was no appearance for the plaintiff.

Telang appeared for the defendant:—He contended that the contract was a wager on the value of goods at a certain date, and was, therefore, void. To prove the contract void was to invalidate a document, and for this purpose evidence was admissible under the Evidence Act I of 1872, sec. 92, proviso I. That clause was not considered in the Calcutta case of *Juggernauth Sew Bux* v. *Rám Dyal*[2]. He cited Bombay Act III of 1865; Contract Act IX of 1872, sec. 40; *Thacker* v. *Hardy*[3].

August 28. SARGENT, C. J.:—The first question referred to us is whether oral evidence is admissible to prove that a contract for the purchase and sale of goods deliverable on a certain day was in reality a gaming transaction, on the ground that neither party intended there should be an actual buyer and seller, but only that the difference between the price when the bargain was made and the price at the time fixed for delivery should be paid

(1) I. L. R., 9 Calc., 791. (2) I. L. R., 9 Calc., 791.
(3) 4 Q. B. Div., 685.

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by one or other of the parties. By Bombay Act III of 1865[1] all contracts, whether by speaking, writing or otherwise, knowingly made to further or assist, &c., shall be null and void. Now a contract in terms for the sale and delivery of goods at a certain time, but upon the understanding that it is not to be carried out, and only the difference of the prices paid, is a wagering contract; or, as Mr. Justice Lindley said in *Thacker* v. *Hardy*[2], "a time bargain, in the sense of an unenforceable bargain." It is true that such a transaction is not declared by the Act to be illegal, but the existence of such "understanding" between the parties, or, in other words, of such an intention on their part is a fact within the interpretation clause of the Evidence Act, illustration (*d*); and as it would invalidate the contract by making it "null and void" might be proved under section 92, proviso I of that Act, which provides that any fact (as interpreted by section 3) may be proved which would invalidate the document. The case of *Doe dem. Chandler* v. *Ford*[3] is an illustration of this rule. There evidence was allowed to be given by the defendant that the annual value of the property on which an unregistered annuity was charged was less than the annuity, although there was a covenant by defendant in the annuity deed that the property was of equal value; the object being to show that the annuity was null and

(1) Act III of 1865, Sec. 1. "All contracts, whether by speaking, writing or otherwise, knowingly made to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts shall be null and void; and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts, or any such agreement or agreements as aforesaid.

Sec. 2. "No suit shall be allowed in any Court of Justice for recovering any commission, brokerage, fee or reward in respect of the knowingly effecting or carrying out, or of the knowingly aiding in effecting or in carrying out, or otherwise claimed or claimable in respect of, any such agreement by way of gaming or wagering, or any such contract as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage, fee or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid."

(2) 4 Q. B. Div., at p. 689. (3) 3 Ad. & Ell., 649.

void for want of registration under Act 58 Geo. III, c. 141 In *Grizewood* v. *Blane*(1), where two contracts in form for the sale and purchase of shares in certain railway companies to be delivered by a certain date were declared on, evidence was admitted in order to prove that the transaction amounted to gambling, that at the time of entering into the contracts neither party meant to sell or purchase the shares; and in *Thacker* v *Hardy*(2), where the case was much discussed, no doubt was thrown on the admissibility of such evidence, although the Court thought that the jury were probably wrong in their conclusion. Lastly, in *Magan'hái Hemchand* v. *Manchhábái Kalliánchand*(3), where the contract was in force for the sale of a share in the Mazagon Company, the case was remanded by the Court of appeal for trial on the issue "whether the contract was a wagering, with liberty to both parties to produce evidence." The effect of proviso I to section 92 does not appear to have been considered, at any rate from the above point of view, in *Juggernauth Sew Bux* v *Rám Dyál*(4). We must, therefore, answer the first question in the affirmative, and remand the case to the Small Cause Court for the purpose of taking evidence.

Attorney for the defendant—Mr. *E. Wilkin.*

(1) 11 C. B., 526.
(2) 4 Q. B. Div., 685.
(3) 3 Bom. H., C. Rep., 79, O. C. J.
(4) I. L. R., 9 Calc., 791.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1888
August 1

KHUSHA'L PA'NA'CHAND, (ORIGINAL DEFENDANT), APPELLANT, *v* BHIMA'BA'I, (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree - Execution—Sale in execution—Certificate of sale—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale

The plaintiff as an agriculturist sued the defendant, to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction-sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband), and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and ac-

* Appeal, No 5 of 1886, from order

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ordingly directed that the mortgage account should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant afterwards found his sale-certificate, and obtained a review of the above order, but on review the Subordinate Judge confirmed his decision, holding that as the sale-certificate was unregistered it could not be received in evidence. The defendant then obtained a fresh certificate, registered it, and renewed his application to the Subordinate Judge, who reversed his previous order, and rejected the plaintiff's claim. The plaintiff appealed to the District Judge, who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court,

Held, that the order of the District Judge should be discharged. A sale certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed, or his representative, cannot, after the sale has been confirmed, dispute the title of the purchaser at the sale. The order confirming the sale completes the title of the latter as against the former.

APPEAL from an order by E. T. Candy, Acting District Judge of Poona.

The plaintiff in this case sued as an agriculturist to redeem certain property mortgaged, with possession, by her deceased husband to the defendant Khushál.

The defendant, (the mortgagee), pleaded that he had bought the interest of the mortgagor, (*i. e.* the plaintiff's husband), in the property at an auction-sale held in execution of a decree passed against him, and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and accordingly directed that the mortgage account should be taken.

The defendant having subsequently found his sale-certificate, applied on the 24th June, 1884, for a review of the Subordinate Judge's decision. His application for review was granted on the 2nd July, 1884. On review, however, the Subordinate Judge confirmed his decision, holding that as the defendant's sale certificate was not registered, it could not be admitted in evidence.

On the 7th October following, the defendant made another application for review, on the ground that since the last order he had obtained a fresh certificate, and got it registered. The Subordinate Judge granted the application, and on production of the

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certificate reversed his former order, and rejected the plaintiff's claim.

The plaintiff appealed to the District Judge, who reversed the lower Court's decision, and remanded the case to be tried on the merits.

From this order of remand the defendant preferred an appeal to the High Court.

Inverarity (*Ganesh Rámchandra Kirloskar* with him) for the appellants:—The defendant, as a purchaser at a Court-sale, had a good title without the certificate. Independently of the certificate, the sale can be proved. As soon as the sale is confirmed, the purchaser gets a good title—*Ráj Kishen Mookorjee* v. *Rádhá Madhub*(1); *Shivrám Náráyan* v. *Rávji Sakhárám*(2). The defendant has already been in possession, and his title is good as against the plaintiff, who has a mere equitable right.

By section 316 of the Civil Procedure Code (Act XIV of 1882) the vesting of the title is quite independent of the certificate. The confirmation of the sale completes the title. As against the plaintiff the title of the defendant vested in 1876. The plaintiff cannot now redeem. The Subordinate Judge's decision rejecting the plaintiff's suit was right.

Malhárlev Bháskar Chanbal for the respondent:—The question before the District Judge was not whether a title had vested in the defendant, or the production of certificate was necessary. He had to determine whether the plaintiff could redeem, the lower Court having disallowed the right. The order of the Subordinate Judge was treated as an order for review, and the District Judge had merely to decide whether such an order could be made. If it was regarded as one for review, the plaintiff ought to have been allowed to give evidence, or to dispute the evidence given in by the defendant. There being negligence on the part of the defendant to register his first certificate, the Court should not grant him another: see *Lalbhái Lakhmidás* v. *Navál Kamáluddin*(3). No other evidence but the certificate is admissible—*Harkisandás Nárandás* v. *Bái Ichha*(4); *Padu Malhári* v. *Rakhmái*(5).

(1) 21 Calc. W. R. Civ. Rul., 349.
(2) I. L. R., 7 Bom., 254
(3) 12 Bom. H. C. Rep., 247.
(4) I. L. R., 4 Bom., 155.
(5) 10 Bom. H. C. Rep., 135.

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KHUSHAL PANACHAND v. BHIMÁBAI

SARGENT, C J.—The plaintiff in this case sued to redeem certain property mortgaged by her deceased husband, Annáji, to one Khushál. The defendant pleaded that the plaintiff was not an agriculturist, and that she had no right to redeem the mortgage, as her husband's interest had been bought by him at an auction-sale, in execution of a decree obtained by one Ladhájí against her husband The Subordinate Judge found the plaintiff was an agriculturist, and that the defendant, not having a certificate of sale, had failed to prove his title, and directed a commission to take the mortgage accounts.

On the 24th June, 1884, the defendant applied for a review of the judgment on the second issue, on the ground that he had since discovered his certificate This was granted by the Subordinate Judge on the 2nd July, 1884, but, on review, judgment on the issue was confirmed, the Court holding that as the certificate produced was unregistered, it could not be given in evidence.

On the 7th October the defendant made another application for review of the judgment passed on the second issue, on the ground that he had since, on the 19th September, 1884, obtained a fresh certificate of sale and had it registered The Subordinate Judge admitted the application, and, on review, reversed the former order, and rejected the plaintiff's claim.

On appeal, the District Judge reversed the decree and remanded the case for a decision on the merits The grounds of his decision are that the review ought not to have been admitted by the Subordinate Judge, and that he ought not to have reversed his former order on the ground urged for the defendant, that since that order was passed, the title to the equity of redemption had become vested in him by purchase

It was contended by Mr Inverarity for the defendant that the proceedings before the Subordinate Judge, regarded as proceedings in review, were irregular in form and should be disregarded, and that the application of 7th October should be treated as one simply for the admission of fresh evidence before the final decree was passed The objection to the form of those proceedings is, in our opinion, of far too technical a character to be allowed It is true that the applications of 24th June, 1884, and 7th

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October, 1884, were, in terms, for a review of the judgment passed on the second issue; but in substance they sought a review of the order which admittedly was made by the Subordinate Judge (although it is said no formal order was drawn up) for a commission to take the mortgage accounts, which indeed was the necessary consequence of the Subordinate Judge's finding on the second issue. Moreover, as long as the order remained in force the fresh evidence would be irrelevant.

As to the remand order now under appeal, we agree with the ruling of the Calcutta Court in *Noimollah Pramanick* v. *Grish Náráin Moonshee* (1) that all this Court can do is to take the facts as found by the District Judge and to say whether, upon those facts, he was wrong in point of law in remanding the case.

In the present case, no error of law has been suggested in the decision of the District Judge rejecting the application for review. If, therefore, the production of a registered certificate was necessary, in point of law, to establish the defendat's plea to the plaintiff's right to redeem, the lower Appellate Court was right in remanding the case.

In *Pada Malhári* v. *Rakhmái* (2), where the plaintiff sought to recover possession, it was held, under the Code of Civil Procedure of 1859, that the transfer of property to the auction-purchaser was not complete until the certificate was granted; secondly, that, unless it was registered, it could not be given in evidence; and thirdly, that no other evidence was admissible to prove the plaintiff's title. That decision has since been followed in this Court in all cases in which the plaintiff is suing in ejectment to obtain possession from a third person who was not a party to the suit. However, in *Krishnáji Rávji* v. *Ganesh Bápuji* (3), where the plaintiff, who had purchased from a purchaser at an auction-sale, sought to redeem, Westropp, C. J., said: "This suit for redemption is of an equitable nature. Equitably the plaintiff and, before the conveyance to him, Yashwant Lingshet, were entitled to redeem. They had successively purchased and paid for the equity of redemption, although the certificate of

(1) I. L. R., 8 Calc., 674.
(2) 10 Bom. H. C. Rep., 435.
(3) I. L. R., 6 Bom., 139, at p. 142.

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sale was not issued until after this suit had begun. It is quite true that a purchaser at a judicial sale is not, strictly speaking, entitled to possession until a certificate of sale has been granted to him; but, as a matter of fact, he not unfrequently is put into possession after the confirmation of the sale and before the issuing of the certificate; and, as will be seen by the observations in *Tukárám* v. *Satvájí*[1], it is exceedingly doubtful that he could be ousted merely for want of the certificate. Sir R. Couch, C. J., was satisfied with proof of the order confirming a sale where the certificate of sale was unregistered, and, therefore, inadmissible in evidence—*Rúj Kishen Mookerjee* v. *Radha Madhub Holdar*[2]."

These remarks show that the late Chief Justice considered that, under the Civil Procedure Code of 1859, the purchaser at a judicial sale, after confirmation of the sale, acquired an equitable title, which, although not completed by the grant of a certificate, was one which the Court, at any rate, would not allow to be disturbed. In *Raj Kishen Mookerjee* v. *Radha Madhub Holdar*[3], Sir R. Couch says: "There was an order confirming the sale, which order would relate back to the time of the sale; the sale would be confirmed as from the date when it was made. And although the certificate of the sale might be necessary for the purchaser, if he was seeking to establish his title against other persons, yet without any certificate the defendant, the mortgagor in that suit, (in which the property was purchased), and the plaintiff in the present suit, (who had acquired the title of the mortgagor), would be bound by the proceedings, and there would be a good title against them." In other words, where the question is between a party to the suit under execution and the purchaser at the auction-sale, the former cannot, after confirmation of the sale, dispute the latter's title. The order confirming the sale would complete the title as against him. The plaintiff here represents the interest of her husband, who was the defendant in the suit in execution of which the present defendant acquired his title. The defendant is, moreover, lawfully in possession (having been so originally as mortgagee), and is resisting an equitable right. The circumstances are thus on

(1) I. L. R., 5 Bom., 207. (2) 21 Calc. W. R. Civ. Rul., 349.
(3) 21 Calc. W. R Civ. Rul., at p. 351.

all fours with those of *Shivrám Náráyan* v. *Rárji Sakhárám* (1), where this Court, following the decision of Couch, C. J., held that the defendant had a good title against the plaintiff without the aid of a certificate. 1888. KHUSHÁL PÁNACHÁNDA v. BHIMÁBHÁI.

We must, therefore, discharge the order of the District Judge, and send back the case for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

(1) I. L. R., 7 Bom., 254.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

FAKI ISMAIL VALAD FAKI ALI SHILOTRI, (ORIGINAL DEFENDANT), APPELLANT, v. MAHOMED ISMÁIL VALAD MAHOMED IBRAHIM MAKBA, (ORIGINAL PLAINTIFF), RESPONDENT.* 1887. *September* 6.

Khot—Managing khot's right to create tenancies—Maphi istdva lands—Suti lands—Sanad—Construction—Fraud.

A managing *khot* is entitled, without any express authorization, to create tenancies in land even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *qud khot*.

In 1832 the British Government granted to the plaintiff's father, Mahomed Ibráhim Makba, the village of Ransai on *khoti* tenure by a *sanad* which provided *(inter alia)* as follows:—

1. That the whole of the land lying waste in the village in the year 1830-31 was granted as *inám*.

2. That, exclusive of this *inám* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following:—

Clause 1st provided that the *khot* should annually pay to Government a fixed sum of Rs. 249 2as. 35rs.

Clause 7th provided that the *khot* should allow the lands, which had been granted on *máphi istáva* tenure to certain *kwaldárs* before the date of the *sanad*, to continue in their possession; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*.

Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment

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settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto.

From 1845 to 1871 the management of the *khoti* village was entrusted to the defendant as a *muktadir*, or lessee, under two *kabuliyats* passed by him—one in 1845 to Mahomed Ibráhim Makba, the grantee of the *khoti* village, and the other in 1858 to the grantee's heirs and legal representatives.

By clause 5th of the *kabuldyat* of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year.

Clause 7th of the same *kabuldyat* was in the following terms:—

"I (the lessee) will bring under cultivation and into prosperous state the waste, culturable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer."

In 1859 some of the *mádhi istáva* lands were sold by the Collector for arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name.

Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the tenants abandoning them. In 1861, when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey.

In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff either the *mádhi istáva* or the *suti* lands which he had acquired during his management.

The plaintiff, therefore, sued, as *khot* of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent, and praying that he should be declared to have acquired and held them in trust for the plaintiff.

The defendant contended *(inter alia)* that the lands in suit were not included in the *khoti* grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the Superintendent of Survey; that under his *kabuldyats* he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account.

Held, on the construction of the *sanad*, that the plaintiff being the *khot* of the whole of the village exclusive of the land granted in *inám*, the *mádhi istáva* lands were included in the *khoti* grant; that the *khot's* interest in them, what-

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ever might be the extent of it, was not separable from the *khoti* estate; and that the *khot* had a reversionary interest in the *máphi istáva* lands as well as in the *suti* lands, which had been abandoned by their former occupants.

Held, also, that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the *kabuláyat* was merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the *makhdár* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*.

Under clause 7th of the *kabuláyat* of 1858 the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village.

The defendant could, therefore, without the intervention of the Collector, have taken up the *máphi istáva* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutikárs*, or taken them up if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands he needlessly invoked the assistance of the Revenue authorities, would not invalidate his title if it could not be impugned on other grounds.

Held, further, that the defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary his action in applying to the Revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was, therefore, not entitled to oust the defendant from the lands in suit.

APPEAL from the decision of Luis J. DeSa, Second Class Subordinate Judge of Panvel, in Suit No. 93 of 1879.

By a *sanad* dated 1st December, 1832, the British Government granted to the plaintiff's father, Mahomed Ibráhim Makba, the whole of the land then lying waste in the village of Ransai in absolute *inám*, and the rest of the village on perpetual *khoti* tenure.

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The material portions of the *sanad* are as follows:—

"To Mahomed Ibráhim Makba Munshi, residing in the island of Bombay. From George Giberne Sáheb, Esquire, Bahádur, Principal Collector (of the) zilla Konkan (with) compliments, *Sur* year one thousand two hundred and thirty-three, (A.D. 1832-33), *Shak* 1754, the name of the year being Naudan. On your having presented a petition to the Bombay (Government) dated the 27th of October, 1831, for the grant of the village of Ransal, táluka Panvel, on *khoti*(1) (tenure) and the waste land in the village as an *inám*(2). (I) was written to from Bombay to institute an enquiry (into the matter), and in consequence thereof (I) having forwarded a communication in writing on the 22nd of December, 1831, an order dated the 9th of January, 1832, was received from Bombay to the effect that the whole of the land that may be waste in the aforesaid village in the *(Sur)* year one thousand two hundred and thirty-one (A.D. 1830-31) be granted as *inám*(2) (to you), and that the village be granted on the *khoti* (tenure), on receiving (from you) every year the amount of the revenue of the aforesaid village in the *Sur* year one thousand two hundred and thirty-one (A.D. 1830-31). On (the order) having been received, the waste land in the aforesaid village has been granted to you as an *inám*(2) and the entire village on *khoti* (tenure). The particulars of the clauses respecting the same (are as follows):—*Clause* 1. The particulars of the *kharip*(3) land in the aforesaid *inám* village have not been entered in the revenue statement of the year 1830-31, because the practice in the aforesaid *tarf* is according to the *hundibundi*(4) (tenure). Therefore (the particulars) of the waste land have been received in writing from the Mámlatdár according to what the land appears in the survey made of the aforesaid *tarf* in the *(Sur)* year one thousand two hundred and twenty-eight (A.D. 1827-28). It is land held on *máphi istára*(5) agreement, besides which there are *bighás* 73-4¾, namely seventy-three *bighás* and four and three-quarters *pands*, which have been granted as an *inám* to you, and the amount (of the revenue) whereof, according to the usage of the *mahál*(6), is Rs. 376-1-84, rupees three hundred and seventy-six and a quarter and *reas* eighty-four, at the rate of Rs. 5-0-56¼ in cash per *bigha*. (The same together with) the waters, trees, grasses, wood, stones, have been given as an *inám*. Therefore, you and your sons, grandsons and other descendants and heirs, &c., are to enjoy the same. Should this *inám* (land) be sold to any other person, a *nazrána*(7) equal to the amount of one year's revenue shall be taken on the occasion of each of such sales.

Clause 1 (as to) the conditions of the *khoti* (tenure), the *inám* land set forth in the above clause having been accepted, the whole of the remaining village, reserving the *dhákri*(8) revenue for the Government, the *ain revenue*(9) together

(1) Tenure under which *khots*, who are farmers of Government villages or lands, hold their lands.

(2) A gift or grant in perpetuity.

(3) Land producing autumnal (harvest).

(4) A settlement under which the assessment is made in gross.

(5) A tenure under which land is granted free of assessments for a certain number of years, with an annually increasing tax afterwards, till it amounts to a certain sum.

(6) A sub-division of a táluka.

(7) A present given to a superior landlord.

(8) Revenue from spirituous liquors. (9) Ordinary or regular revenue.

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with the *sivaya*(1) *jama* has been agreed to be and is hereby granted to you on perpetual *khoti* (tenure) from *(Sur)* year one thousand two hundred and thirty-two (A.D. 1831-32 ;) the clauses respecting which (are as follows) :—

Clause 1.—The amount (of the revenue) of the village, excepting the *dhkári*, is as follows :—

* * * * * * * *

Deducting therefrom the following items * * * * * the balance Rs. 249-2-35, namely two hundred and forty-nine and a half rupees and thirty-five *reas*, is the amount fixed according to the revenue settlement of the *(Sur)* year one-thousand two hundred and thirty-one, (A.D. 1830-31). You are continually to pay this sum every year into the treasury of the Collector Sáheb, according to the currency of the *mahál* of *tarf* Aurvalet (namely), a moiety before or immediately at the intermination of each year according to the usage of Government ; but should the Collector Sáheb think proper at any time in each year to take security for (the payment of) the aforesaid sum, you shall have to furnish one ; and if you do not furnish such security to the satisfaction of Government, the revenue of the village shall be attached by Government according to the regulations.

* * * * * * * *

Clause 7.—You are to allow the lands that have been granted to (different) persons on *máphi istáva* (tenure) previous to this grant to continue with them. You are to recover every year from the parties holding them on *máphi istáva* such Government dues as may have to be received each year on account thereof, and you are to pay the same to Government over and above the amount stipulated with you in (this) grant.

* * * * * * * *

Clause 9.—Such persons as possess *suti lands* in the aforesaid village have full authority to (or are the owners of) those lands. Should a new survey be made and a (new) assessment be settled by Government in the aforesaid *mahál*, the same shall be settled by Government for the holders of the *suti* (lands) agreeably thereto.

* * * * * * * *

FROM 1845 to 1871 the defendant was in management of the village as a *maktadár*, or lessee, under two *kabuláyats* executed by him—the first in 1845 to the original grantee Mahomed Ibráhim Makba, and the second in 1858 to the grantee's legal representatives.

The *kabuláyat* of 1858 was in these terms :—

"You hold the village of Ransal as *inám* and on *khoti* (tenure) from Government. I have taken the aforesaid village from you on contract for three years at Rs. 249, in letters two hundred and forty-nine. With regard to the agreement for payment of the said amount and of the amount to be paid to Government on account of the *khoti* (tenure) the following are the clauses thereof :—

1. "This contract is to last for three years in all, (*viz.*) from the *(Sur)* year twelve hundred and fifty-nine to the *(Sur)* year twelve hundred and sixty-one, (corresponding with the Christian year 1858-59 to 1861-62).

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2. "I will go on paying two hundred and forty-nine rupees every year at the harvest time.

3. "I will go on paying cash by instalments direct to Subha, táluka Panvel, in respect of Government assessment in money and *bhát* in kind on account of *khoti* land.

4. "I will go on carrying the management of the village as is done every year. If I do anything more or less, and if Government attach any balance, I will answer for the same; you have nothing to do with it.

5. "I will carry on the management of the village and render a detailed account of the balance of the village revenue every year.

6. "If Government assessment increases or decreases during the three years, I will pay the same; you have nothing to do with the same.

7. "I will bring under cultivation and in a prosperous state the waste cultivable and uncultivable land of the aforesaid village. I will take the proceeds of the same during the year of my contract. After the expiration of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let the village on lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer.

8. "I will take good care of the teak trees which are reserved in the jungle. I will not suffer the wood thereof to be cut, nor will I cut it. I will not cut the jungle (common or jungles) of timber which may be useful for erecting buildings, nor will I trade in the same. If the rayats should require timber for sundry purposes, I will give the same to them.

9. "After the expiration of the years of the contract should any balance remain I will recover the same. You have nothing to do with the same."

The plaint alleged that while the defendant was in management of the village as a lessee, he illegally and fraudulently got certain lands in the village, which had been abandoned by the tenants, to be entered in his own name in the revenue records, and passed a *kabulayát* to Government for the same; that in 1871, when his management ceased, he refused to deliver up possession of the said lands to the plaintiff, alleging that he had acquired those lands as his private property.

The plaintiff, therefore, sued as *khot* of the village to recover the said lands together with mesne profits from 1871 down to the institution of the suit in 1879 and for the mesne profits from the institution of the suit up to delivery of possession.

The defendant answered that the claim was time-barred; that the lands in dispute being Government property were partly granted to him by the Collector in 1859 and partly by the Superintendent of Survey in 1861-62 at the introduction of the

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survey into the village; that they had not been acquired by him by unfair or fraudulent means; that the plaintiff could not claim ownership over the said lands under the *sanad* of 1832; that under the agreement, by which the defendant had been put in management of the village, he was entitled to acquire Government lands from Government for his own use and benefit; that the lands which were acquired in 1859 were *máphi istáva* lands; that as the occupants of those lands did not pay the assessment, the lands were sold by the Collector for arrears of land revenue, and bought in by Government; that Government subsequently granted them to the defendant; that, therefore, whatever interest the plaintiff might have originally had in those lands, had become null and void as against the defendant's title; that the plaintiff was only entitled to the assessment of the lands in suit, which the defendant had never refused to pay.

The Subordinate Judge of Panvel dismissed the plaintiff's suit as time-barred.

The Appellate Court reversed this decision and remanded the case for trial on the merits.

Against this order of remand an appeal was preferred to the High Court. The High Court rejected this appeal, reserving, however, to the parties the right of raising the question of limitation in the appeal against the final decree.

On remand the Subordinate Judge found that the plaintiff was entitled to the lands in dispute, and that the defendant had wrongfully acquired them. He was of opinion that the whole village in question belonged to the plaintiff on *khoti* tenure under the *sanad* of 1832, subject to certain limitations therein set forth, and that when any *rayat* relinquished or lost his interest in his holding, the plaintiff became entitled thereto by reason of his being the *khot* of the village. Accordingly when the occupants of *máphi istáva* lands refused to pay the full assessment leviable thereon, and threw up the lands in dispute in 1859, the defendant, as plaintiff's agent, was bound to take up those lands on behalf of his principal. Instead of doing so the defendant, without informing the plaintiff, induced Government to sell the lands for arrears of revenue and then

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to grant them to himself. This, the Subordinate Judge held, clearly amounted to a fraud on the plaintiff's rights, and the defendant could not equitably be permitted to take advantage of his own wrong.

With reference to clause 7 of the second *kabuláyat* (Exhibit No. 23) executed by the defendant, the Subordinate Judge was of opinion that the defendant was empowered by that clause to cultivate unoccupied lands for his own benefit during the term of the lease, and that, consequently, he was at liberty to let them to others for the term of his own lease only, and that on the expiration of his lease he was entitled to continue in occupation of the lands on payment of rent at the customary rates. In other words, the defendant was to hold the lands rent-free during the term of his lease, and afterwards on payment of reasonable rent to the *khot*.

Upon the construction of this clause of the *kabuláyat*, as well as of the terms of the *sanad* of 1832, the Subordinate Judge came to the conclusion that the plaintiff was entitled to the lands in dispute, and that the defendant as plaintiff's agent had acquired them in trust for the plaintiff.

He, therefore, passed a decree in plaintiff's favour, awarding the lands in question together with mesne profits as claimed in the plaint.

Against this decision the defendant appealed to the District Court, but the appeal was transferred to the High Court.

Macpherson (with him Rávˇ Sáheb *V. N. Mandlik* and *Shántárám Náráyan*) for the appellant:—The defendant is not a trustee. There is not a single word in the *kabuláyat* passed by the defendant showing that he stood in a fiduciary relation to the plaintiff. Under those *kabuláyats* the defendant's position is that of a lessee or assignee of the *khoti* rights in the village during the period of his lease. Clause 7th of the *kabuláyat* of 1858 distinctly enables the defendant to take up waste lands in the village, and either cultivate them himself or let them to tenants. If he himself cultivates them, he is entitled to retain them so long as he pays the customary rent. The lands in suit are partly *kowli* lands

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and partly *suti* lands. The *sanad* shows that there is a distinction between the two classes of land. The *kowli* lands were granted to different persons before the date of the *sanad* of 1832. The *khot's* rights with reference to these lands are only to collect the assessment and pay it over to Government. Those lands are outside his *khoti* estate. They belong to Government, and they were sold by Government for arrears of assessment. Government bought them in, and afterwards granted them to the defendant, not because he was then the managing *khot*, but because he offered to pay and did pay one year's assessment. It was on this account that preference was given to the defendant over another applicant. This occurred in 1859. In 1861 the defendant acquired some *suti* lands either by purchase from the former *sutidárs*, or because they were abandoned by the occupants. And his title to these lands was recognized by the Survey Superintendent. These acquisitions the defendant had a perfect right to make on his own account. There is nothing to show that he acted fraudulently in making these acquisitions He is, therefore, entitled to retain them on payment of the usual rent.

Telang (with him *Pándurang Bálibhadra*, *M. O. Apte*, and *S. M. Rele*) for the respondent:—Under the *sanad* granted to the plaintiff's father the whole of the village, except the lands granted in *inám*, is given on *khoti* tenure. The *khoti* rights would, therefore, extend over *kowli* lands equally with other descriptions of land in the village. The *khot's* ulterior rights over the *suti* lands are quite consistent with the *sutidár's* rights. If a *sutidár* abandons his holding, the *khot* has a right to take it up and cultivate it either himself or by tenants. There is practically no distinction between *kowli* and *suti* lands. When the assessment on *kowli* lands reaches the full amount, the *kowli* holding becomes a *suti* holding. As *khot* the plaintiff has a right to all vacant lands and to make profit therefrom. The defendant under clause 7th of the *kabulâyat* was bound to do this for us. When the *kowlidárs* made default in payment of the assessment, it was the duty of the defendant to declare their holdings forfeited and let them to others. Instead of that, he

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got the lands sold by the Collector and transferred to his own name. This was clearly wrongful, and in fraud of the plaintiff's rights. The defendant was in a fiduciary relation to the plaintiff. Under clause 5th of the *kabuláyat* he admits his liability to furnish us with a detailed account of the net income of the village. He was our agent, and any benefit he acquired as agent must be for, and on behalf of, the principal—*Bálkrishna Vásudev* v. *Mádhavráv Náráyan*[1]. The defendant who caused the sales and himself became the purchaser must be deemed to be a trustee. Refers to *Jones* v. *Kearney*[2].

BIRDWOOD, J.:—The plaintiff seeks, as *khot* of the village of Ransai in the Panvel Táluka, to recover, with mesne profits, certain lands which the defendant, while lessee of the village, acquired from the Collector of Thána and the Superintendent of Revenue Survey. The plaintiff says that the acquisition was fraudulent and that the defendant should be declared to hold the lands as his trustee. He says further that he became aware of the fraud at the end of April 1871, when the village was restored to him by the defendant, without the said lands.

The defendant, among other answers to the claim, says that it is time-barred, and that the property in suit was not acquired by him wrongfully or fraudulently; that he passed a *kabuláyat* to the Collector for some of the lands in 1859; and that some were granted to him by the Survey Superintendent at the time of the survey settlement in 1861-62; and, further, that the land was the property of Government; and that by the express terms of the lease on which he held the village from the plaintiff he was entitled to take up the land direct from the Government; and that, after giving up the management of the village, he annually tendered the Government assessment due on the land to the plaintiff as *khot*, but that the plaintiff refused to accept payment.

The suit was filed, in the first instance, on the 27th March, 1874, in the District Court of Thána, against the present defendant and the Collector and the Superintendent of Survey. It was decided by the Assistant Judge in the plaintiff's favour

(1) I. L. R., 5 Bom., 73. (2) 1 Dr. & War., 134.

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on the 14th January, 1875. In appeal, the District Judge reversed the decision on the ground that, as against the Collector and the Superintendent, the suit was barred by time, and that, as against the present defendant alone, the District Court had no jurisdiction to hear it. Thereupon the plaintiff, on the 5th February, 1879, filed the suit in the Court of the Subordinate Judge of Panvel, who dismissed it as barred by time, but his decision was reversed on appeal on the 30th August, 1882, and the suit remanded for trial on the merits. An appeal against the order of remand was dismissed by the High Court, without prejudice to the right of the parties to raise the question of limitation again in a final appeal. The Subordinate Judge, Mr. de Sa, who has now heard the suit, has decided it in the plaintiff's favour. His decision was appealed against to the District Court, but the appeal was transferred to this Court on the 1st October 1884.

In the view we take of the case, it is unnecessary for us to consider the question of limitation. We have no doubt that the defendant is entitled to retain possession of the lands acquired by him in 1859 and 1861-62. Whether he holds those lands conditionally on the payment of the survey assessment, said to have been tendered by him, from time to time, to the plaintiff, or is liable to pay the rent payable by any particular class of *khoti* tenants, is a question which does not fairly arise between the parties in the present suit, and we do not decide it.

The village of Ransai was granted to the plaintiff's father by the Bombay Government in 1832. The *sanad* is filed as Exhibit No. 16, and contains two principal clauses;—one dealing with the grant of certain lands in *inam*, and the other relating to the *khoti* grant. By the first clause, the whole of the land lying waste in the village in 1830-31 was granted in absolute *inám*, subject to a *nazrána*, equal to one year's assessment, on alienation by sale. The extent of this land was ascertained by deducting from the amount shown to be waste in a survey statement of the year 1827-28 certain lands which had since been granted on *máphi istáva* tenure, under which the occupant at first holds the land free of assessment and then pays a gradually

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increasing tax, which at last rises to the full assessment. It is one of the questions for consideration in this appeal whether this *máphi istáva* land was included in the *khoti* grant. The *inám* grant comprised 73 *bighás* and 4¾ *pands*. By the second clause of the *sanad*, all the rest of the village, with its ordinary revenue *(ain jama)* and its extraordinary revenue *(sivai jama)*, but not including its *ábkári*, which was reserved for Government, was granted in perpetual *khoti* from the year 1831-32 on certain terms, which are set forth in twelve sub-clauses, of which it is necessary to refer only to the following: By the first sub-clause the *khot* was bound to pay annually to Government the sum of Rs. 249¼ and 35 *reas*, that being, according to the *jamábandi* or revenue settlement for the year 1830-31, the revenue actually leviable by Government in that year on account of the assessment on *kharif* and *varkas* land and on toddy trees, and on account of certain dues, taxes and fees, after making certain deductions on account of *páldárs* or persons exempt from taxation. In addition to this fixed annual payment, the *khot* was bound, by the seventh sub-clause, to pay to Government the variable sums leviable from the persons to whom lands had been already granted by *kowl* or lease on *máphi istáva* tenure. We think that, on the right construction of this sub-clause, the *khot* was not merely bound to hand over to Government the sums actually levied from these *kowldárs*, but that he was bound to collect the gradually increasing revenue due by them, using for the purpose the power which he could avail himself of according to law, and that, whether he collected such revenue or not, he was responsible for it himself to Government. The language of the sub-clause might well have been clearer; but it distinctly imposes on the *khot*, at all events, the duty of collecting the whole amount due by the *kowldárs* in any year. The sum actually collected was necessarily payable by him. That he was also liable for sums payable to Government on the *kowls*, though he might fail to collect them, we infer from the context. The position of the sub-clause in the *sanad* and the expression used with reference to the grant in *khoti*,—that it was of the "whole" *(darobast)* of the village, exclusive of the lands granted in *inám*, (and of the *ábkári* revenue),—alike show that the *máphi istáva*

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lands were included in the *khoti* grant, and that the *khot's* interest in them, whatever may have been the extent of it, was not separable from the *khoti* estate. That being so, the revenue due to Government in respect of those lands was secure, after the grant in *khoti* was made to the plaintiff's father, whether the *khot* collected the revenue or not. After making the grant, the Government no longer looked, (or at all events it was not necessary for the Government to look) to the *kowldárs* for satisfaction of its revenue demand, but to the *khot;* and there can be no doubt that the defendant himself, when lessee of the *khot*, at one time recognized his liability in this matter; for he paid assessment to Government on some of the lands in suit, which were *máphi istáva* lands, even when he had failed to collect it from two of the *kowldárs*, the lands having lain waste "for many years," as the defendant says in his application, of the 13th December, 1858, to have the lands transferred to his name. (See Exhibit No. 134.)

It appears that some of the lands in suit are included in the *suti* lands referred to in the ninth sub-clause of the clause of the *sanad* relating to the *khoti* grant. That sub-clause affirms the right of *sutidárs* as owners *(mukhtyárs)* of their lands; and also declares their liability to any future survey settlement. It is not contended that these lands lie outside the *khoti* estate, and apparently they are included in the lands in respect of which a fixed annual revenue was leviable from the *khot*. It was not stated to us, in argument, when the *suti* lands in suit were acquired by the defendant. Perhaps we are not wrong in assuming that these are the lands for which the defendant says he obtained a lease from the Superintendent of Survey in 1861-62, the *máphi istáva* lands or the greater part of them having been previously obtained from the Collector in 1859, after the right of occupancy of the defaulting holders had been sold and bought in by Government. It is not apparently contended on behalf of the plaintiff that he himself possessed any right, as *sutidár*, or any other private right, in any of the lands acquired by the defendant, who seems, in some way not explained to us by the counsel on either side to have acquired the

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right of a *sutidár* in respect of certain lands, whether by purchase from previous *sutidárs* or by taking up land given up by them or otherwise, and to have had his right recognized at the time of the survey settlement when the land was entered in his name in the Government books. It is as *khot*, and not as *sutidár*, that the plaintiff attacks the defendant's position, and he can only succeed, whether as regards the *kowli* or the *suti* land, by showing that the defendant's acquisitions were in contravention and in fraud of his rights as *khot*.

Those acquisitions were made, as the plaint sets forth, while the defendant was in possession and management of the village as the plaintiff's lessee. The first lease or rather *kabuliyat* (Exhibits 22 and 23) was one for five years and was granted in 1845. The second (Exhibit No. 23) was for three years and was granted in 1858. But on the expiry of that lease the defendant continued to be the plaintiff's lessee from year to year till 1871; and the conditions of his tenure of the *khotship* during that period must be held to have been regulated by the terms of the second lease. By the fifth clause of that lease the defendant bound himself to "carry on the management of the village and render a detailed account of the balance of the village revenue every year." It is contended for the plaintiff that this engagement to furnish accounts shows that the defendant occupied the position of a trustee towards the plaintiff, and that as the plaintiff had a reversionary interest in the *kowli* and *suti* lands, it was not competent to the defendant, when those lands ceased to be the property of their former owners, to acquire them on his own account. If there was a subsisting relation of trusteeship between the parties, then no doubt this contention would be good; for, under the *khoti* system, even in the Northern Konkan, the *khot* has the power to assume for himself the occupancy of neglected and vacated land comprised within the *khoti* estate. The estate created by the *sanad* in the present case was apparently of the same kind as the *khoti* estates in the Alibág Collectorate of which a description is given in *Tajubái's Case*[1]. In the judgment, in appeal, of the District Court in that case, which

(1) 3 Bom. H. C. Rep., A. C. J., 132, at pp. 137, 151, 157.

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was confirmed by a majority of the Bench of this Court which heard the special appeal, it is stated that "the privilege of the *khot* to enjoy the first refusal of all vacant and available land in his *khotship* is a natural incident of his position." In the judgment of the High Court, delivered by Newton, J., for himself and Arnould, J., it is stated that "the right to cultivate such waste or other lands as may be at the *khot's* disposal, or to give them out in cultivation under such terms as may be most to his advantage, must * * be viewed as the recognized mode of his remuneration for the services rendered." And Tucker, J., who dissented from that judgment, observed that "in the lands where the tenant-right existed, the *khot* would have a reversionary interest, if the occupant abandoned them, or refused to pay the prescribed rent, and over the other lands his ownership would be complete." In the present case, then, it may be conceded that the plaintiff had a reversionary interest in the *kowli* lands, which had been practically abandoned by their former owners, and that if the *suti* lands were similarly abandoned, or if the former owners had no right to alienate them without his consent, he had such an interest also in those lands; but it does not follow that, while managing the village as the plaintiff's lessee, the defendant could not acquire on his own account the lands in suit. The engagement to furnish accounts of the balance of the village revenue at the end of each year was, as we read it, simply an engagement to furnish the plaintiff with information which would be of use to him, and which it would be indeed necessary for him to possess, when he resumed the management of the village on the expiry of the three years for which the village was leased to the defendant in 1858. It imported nothing more than that; and the whole transaction of which Exhibit No. 23 is the evidence is merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter, to be exercised and discharged for a certain period by the former. For that period and thereafter, till 1871, the defendant was, as he is described in the plaint, the *muktadár* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was

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bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound, as it seems to us, by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*. Indeed, there is a clause in the *kabulâyat*, No. 23, which seems to specially authorize such an acquisition as was made by the defendant in respect of the *kowli* lands in the present case. Clause 7 is in the following terms:—"I will bring under cultivation and into a prosperous state the waste culturable and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract, you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village?) or lease to any body for a longer period than for the period of the contract. If I let it, I will make good the damages you may suffer." The earlier part of this clause would equally apply to land allowed by an occupant to become waste during the period of the defendant's tenancy as to land lying waste in 1858. It would apply, therefore, to the *kowli* lands in suit, and may also have applied to the *suti* lands acquired by defendant. It distinctly permits the defendant to bring waste lands into cultivation for his own full benefit pending the lease, and it seems also to permit him thereafter, if himself the cultivator, or else, the cultivator put in by him, to retain them on paying to the plaintiff the assessment "according to the practice of the village." It can scarcely be questioned that, in the present case, the defendant would have been justified in putting in some other tenant than himself on the lands vacated by the two *kowlddrs*. It would have been necessary for him to do so to protect his own interests as managing *khot* for the time being, and in order to recover "in the recognized mode" his "remuneration for the services rendered" by him in that capacity. Had he allowed the land to remain waste, he would not only have suffered loss, as he actually says he did "for many years," by having to pay the assessment due on the land to Government, but he would have neglected also the interests of the plaintiff himself, who, on resuming the *khotship*, would have found this land lying waste

and might have had some difficulty in procuring a tenant for it. By taking up the land himself, he did not place himself in a position inconsistent with such duty as he owed to the plaintiff, or render himself less fitted to discharge that duty. As assignee of the rights and powers of the *khot* the defendant's power to grant waste lands to tenants other than himself by lease is indeed limited by clause 7 to the period of his own lease. That restriction seems, however, to apply to any favourable terms that might be granted by the defendant as regards rent, as compared with the customary rent payable in the village. For the earlier part of the clause would apparently be applicable alike to tenants put in by the defendant as to the defendant himself. The intention seems to have been that the defendant was either to take up waste lands himself or put in tenants;—that if he put in tenants on lease, the special advantages of any leases were to expire with his own lease. The actual occupation of land was not, however, to be interfered with; inasmuch as the tenants were to continue to pay rent, though at customary rates, which they could not of course do if any tenancies created by defendant were to be altogether destroyed on the expiry of his lease. Such a construction is a reasonable one to put on the somewhat obscurely worded provisions of clause 7 of the *kabuláyat*; and the right thereby given is no more than what, we should think, would ordinarily be conferred on any managing *khot*, to enable him, even for a short period, to efficiently discharge his duties as *khot*. Such a *khot* ought, without any express authorization, to be able to create tenancies in land, even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *quâ khot*: see *Rámchandra Narsinha Mahájan* v. *The Collector of Ratnágiri* (1).

We are inclined to think that, in the present case, the defendant could, without the intervention of the Collector, have taken up the *kowli* lands in suit and become himself the tenant, and

(1) 7 Bom. H. C. Rep., A. C. J., 41, 43.

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that he also could have acquired the *suti* lands from former *sutidárs* or taken them up, if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands, he invoked assistance for which there may have been no legal authority, would not, however, invalidate his title if it cannot be impugned on other grounds.

It is impugned on the ground of fraud; and no doubt, if the imputation of fraud is established, the defendant cannot retain any advantage he may have acquired. As we have said, though the defendant was not a trustee, yet a certain confidence was necessarily reposed in him as a tenant; and the question is whether he, as plaintiff's tenant, has "in a secret manner, for his own advantage," sacrificed the plaintiff's interests. If so, then he cannot be permitted to hold any advantage he has acquired by such means. (See Story's Equity Jurisprudence, sec. 323). That is the rule to be applied to the case, and there is no evidence apparently to justify our finding that the defendant acted in a surreptitious or secret manner in acquiring the lands in suit. He was bound, no doubt, to pay the assessment on the *kowli* lands; and if his own wilful or negligent omission to pay the assessment had occasioned the sale by the Revenue authorities and he had then purchased, he would then in equity be treated as trustee of the land purchased by him—*Bálkrishna Vásudev* v. *Madhavrán Nárayan* (1). But that was not the case here. He brought the omission of the *kowldárs* to pay him assessment to the notice of the Revenue authorities, but not apparently with the object of causing the land to be sold. The right of occupancy seems already, when he made his petition of the 13th December, 1858, to have been sold (see Exhibit No. 134) by the Revenue authorities, although the land formed a part of the *khoti* estate. There is nothing to show that the defendant caused the land to be sold. He applied to have it transferred to him;—unnecessarily, so far as we can judge in the present case, to which the Collector is no longer a party;—and, after enquiry, the land was granted to him in preference to another applicant, because he was willing to pay assessment for the then current

(1) I. L. R., 5 Bom., 73.

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year when taking up the land. His action in applying to the Revenue authorities may have been unnecessary, but it was not secret; and is rather, as it seems to us, a sign of his good faith than of any fraudulent intent. He may well have thought that an application to the Revenue authorities was necessary in the case of land granted by Government on special terms before the grant in *khoti* was made to the plaintiff. And his action, as we have already said, was distinctly to the advantage of the plaintiff. It certainly placed the plaintiff in no worse position than he was when the original *kowldárs* were in occupation; and it may place him in a better position, if any rent higher than the full Government assessment should now be leviable from the defendant.

Nor can we find that, by obtaining the transfer to himself of certain *suti* lands, whether from former *sutidárs* or otherwise and obtaining an acknowledgment from the Superintendent of Survey of his right to retain the possession of those lands, if that was really what he did, he acted secretly or sacrificed the plaintiff's interests, though it is quite possible that the action of the Superintendent himself may have had no warrant in law. As to that, or, as we before said, as to the rents legally leviable from defendant, we decide nothing.

We are of opinion that no ground has been shown for ousting the defendant from the lands in suit; and that finding is sufficient for the decision of this case. The decree of the lower Court is reversed. The plaintiff's claim is rejected with costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1887. *November 24.*

NA'RO PA'NDURANG AND OTHERS, (ORIGINAL DEFENDANTS), APPLICANTS, *v.* MAHA'DEV PURSHOTAM, (ORIGINAL PLAINTIFF), OPPONENT.*

Jurisdiction—Civil Court's jurisdiction over suits in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary Offices' Act (III of 1874), Sec. 40—Election of an officiator—Free election—Agreement in restraint of free election—Act X of 1876, Sec. 4—Its application to suits between private persons.

The plaintiff and his co-sharers in a *kulkarni vatan* entered into an agreement in 1869 for the performance of the duties of the *vatan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869.

Held, that the agreement could not be enforced by a civil suit, as it was opposed to the policy of section 40 of Bombay Act III of 1874, which contemplates a free election of an officiator by the whole body of registered representative *vatandárs* to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers.

Held, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of clause (*a*) of section 4 of Act X of 1876. Having regard to the wording of the several clauses of section 4, the bar therein provided is not limited to suits against Government.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff sued to recover Rs. 100 as damages for breach of an agreement dated the 30th December, 1869. He alleged that the defendants were his co-sharers in the *kulkarni vatan* of Gopálpur; that in 1869, when the *vatan* register was prepared, all the co-sharers in the *vatan* entered into an agreement to the effect that the duties of the *vatan* should be performed in turn by the several sharers, and that if any sharer prevented the nomination of any co-sharer to officiate in his turn, he was to pay Rs. 100 as damages to the person thus excluded from office. The plaintiff further alleged that in 1883 it was his turn to officiate; that the defend-

* Application under extraordinary jurisdiction, No. 103 of 1887.

ants objected to his nomination, and induced the Collector to appoint another person, thereby acting in direct violation of the agreement of 1869. Hence the present suit.

The defendants contended *(inter alia)* that the agreement in question was illegal under Bombay Act III of 1874, and could not be enforced by a Civil Court.

The Subordinate Judge held, on the authority of *Sitárám Vináyak* v. *Rámchandra Bábáji*[1], that the agreement was legal, and that he had jurisdiction to entertain the suit. He passed a decree in favour of the plaintiff, and his decree was confirmed on appeal.

The defendants thereupon applied to the High Court under its revisional jurisdiction to set aside the lower Court's decision, on the ground that the suit was not cognizable by a Civil Court.

A rule *nisi* was granted, calling upon the plaintiff to show cause why the decree should not be set aside.

Ganesh Rámchandra Kirloskar, for the plaintiff, showed cause :—The question in this case is not one which the Collector has to determine. The question of the right to officiate is not at issue in this case. Under section 40 of Bombay Act III of 1874, the *vatandárs* are free to make an election of an officiator or deputy. They are, therefore, at liberty to make any arrangement among themselves for the election or appointment of an officiator. Such an arrangement would be perfectly legal and enforceable in a Civil Court. The case of *Sitárám Vináyek* v. *Rámchandra Bábáji*[1] is analogous to the present. The Civil Court has therefore, jurisdiction to entertain the present suit.

Ghanashám Nilkanth, contra :—The ruling in *Sitárám Vináyak* v. *Rámchandra Bábáji*[1] has no application to the present case. Section 4 of Act X of 1876 ousts the jurisdiction of the Civil Courts in cases of this kind.

BIRDWOOD, J. :—The decision in *Sitárám Vináyak* v. *Rámchandra Bábáji*[1] does not govern the present case. All that was really decided in that case was that the assignment of the income of the

(1) Printed Judgments for 1885, p. 24

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village of Govardhan was not in contravention of section 5 of Bombay Act III of 1874. Nor are the cases of *Vásudev Vithal Samant* v. *Rámchandra Gopál Samant*(1) and *Shivájí Nilkanth* v. *Tirko Bhimáji Nádgir*(2) exactly in point. In the present case, the plaintiff and the defendants were co-sharers in a *kulkarni vatan* and entered into an agreement, in 1869, for the performance of the duties of the *vatan* by the several sharers in turn. If any of the sharers prevented the nomination of a sharer to officiate in his turn, he was to pay Rs. 100 as damages to the person thus excluded from office or service. Damages are claimed in the present case in respect of the plaintiff's exclusion from office in the year 1883, when it became his turn to officiate. The Collector issued a notice to the sharers, under section 40 of Bombay Act III of 1874, calling upon them to appear before him to elect an officiator for that year. It is alleged that, instead of electing the plaintiff, in accordance with the agreement of 1869, the defendants nominated another person, not a representative *vatandár*, who was accordingly confirmed in the appointment by the Collector, and deemed to be a deputy under clause 3 of section 40. We think that the agreement of 1869 cannot be enforced by a civil suit, not only because it is opposed to the policy of section 40 of the Act, which clearly contemplates a free election of an officiator by the whole body of registered representative *vatandárs* to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers—but also because a suit in respect of any injury caused by exclusion from office or service is expressly barred by the second paragraph of clause (*a*) of section 4 of Act X of 1876.

With reference to the doubt suggested in the judgment in *Vásudev Vithal Samant* v. *Rámchandra Gopál Samant*(3), we are of opinion, having regard to the wording of the several clauses of section 4, that the bar therein provided is not limited to suits against Government. The section is fully in force in the Sholápur District, where the present suit has arisen, being unaffected, as regards that district, by Act XVI of 1877. We find, therefore,

(1) I. L. R., 6 Bom., 129. (2) Printed Judgments for 1885, p. 206.
(3) I. L. R., 6 Bom., 129.

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that the Courts below had no jurisdiction to hear the present case.

We reverse the decisions of both Courts, and reject the claim, with costs throughout.

Decree reversed and rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1887.
November 28.

VENKUBA'I, WIDOW OF VENKA'JI ANA'JI POTDA'R, (ORIGINAL PLAINTIFF), APPLICANT, *v.* LAKSHMAN VENKOBA KHOT, (ORIGINAL DEFENDANT), OPPONENT.*

Limitation—High Court's revisional powers—Civil Procedure Code (XIV of 1882), *Sec.* 622—*Material irregularity.*

On the 29th November, 1886, this suit was filed on a bond dated 29th November, 1881, payable in two years.

The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November, 1883.

Against this decision the plaintiff applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Held, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November, 1883, —that is, the day of the month corresponding with the day on which the bond was dated.

Held, further, that the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The Privy Council ruling in *Amir Hassan Khán* v. *Sheo Baksh Singh*(1) explained.

Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible there is no remedy under section 622 of the Code or under the provisions of section 15 of Statute 24 & 25 Vic., c. 104, whatever remedy there may be, in the Bombay Presidency, under clause 2 of section 5 of Regulation II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction.

* Application under extraordinary jurisdiction, No. 65 of 1887.

(1) I. L. R., 11 Calc., 6.

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THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff sued on behalf of her minor sons to recover Rs. 275 on a bond dated the 29th November, 1881, payable in two years. The suit was filed on the 29th November, 1886.

The Subordinate Judge dismissed the suit as time-barred. He was of opinion, that the cause of action had accrued on the 28th November, 1883, and not on the 29th November, 1883, as stated in the plaint.

Against this decision the plaintiff applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The Court (West and Birdwood, JJ.,) granted a rule *nisi* calling upon the defendant to show cause why the decree of the lower Court should not be reversed, on the ground that the Subordinate Judge had erred in computing the period of limitation.

Vásudev Gopál Bhandárkar showed cause:—This is not a case in which this Court will interfere under section 622 of the Code of Civil Procedure. The lower Court has not declined to exercise a jurisdiction vested in it by law. The Privy Council case of *Amir Hassan Khán* v. *Sheo Baksh Singh*[1] shows that this Court should not interfere even though the lower Court arrives at a wrong decision, provided it has jurisdiction over the suit.

Ghanashám Nilkanth, contra:—This is a case in which the Court declined to exercise jurisdiction. The case falls within the principle of the ruling in *Amritráv Krishna* v. *Bálkrishna Ganesh*[2]. The cause of action arose during the minority of the plaintiff. The lower Court is palpably wrong in computing the period of limitation.

BIRDWOOD, J.:—The plaintiff sued on a bond dated the 29th November, 1881, and payable in two years. The Subordinate Judge has held that the suit, which was brought on the 29th November, 1886, is barred by time, the right to sue having, in his opinion, accrued on the 28th November, 1883. The plaintiff

(1) I. L. R., 11 Calc., 6. (2) I. L. R., 11 Bom., 488.

has, however, correctly stated in the plaint that the cause of action arose on the 29th November, 1883, for the period of two years specified in the bond must be held to have terminated on the day of the month corresponding with the day on which the bond was dated.

In a recent case—(Application No. 46 of 1887, decided on the 2nd August last)—the same Subordinate Judge held that where a bond dated the 14th June, 1883, was payable in six months, the right to sue accrued on the 13th December, 1883, and that a suit brought on the 14th December, 1886, was barred by time. He relied on the ruling in *Waman Dhondev* v. *Mahádu Bálu*[1]; but this Court held that his decision was palpably wrong, according to the judgment in that case, and reversed his decision in the exercise of its extraordinary jurisdiction. In a previous similar case—(Application No. 26 of 1887, decided on the 21st March last)—this Court, however, declined to interfere with the decision of the same Subordinate Judge, and expressed the opinion that the case was one in which he might properly admit a review of judgment on the ground of oversight in his interpretation of the judgment relied on by him.

There can be no question, then, that, in the present case, the Subordinate Judge wrongly decided that the claim was barred by time.

We think further that we can correct his error in the exercise of our extraordinary jurisdiction, and that we are not precluded from so doing by the decision of the Privy Council in *Amir Hasan Khán* v. *Sheo Baksh Singh*[2]. In that case it was held that where a Court had perfect jurisdiction to decide a question before it and decided it, then, even if it decided wrongly, it did not exercise its jurisdiction illegally or with material irregularity within the meaning of section 622 of the Code of Civil Procedure. There can be no question that where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions, with which it has jurisdiction to deal, its error can

(1) Printed Judgments for 1885, p. 251. (2) I. L. R., 11 Calc., 6.

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only be corrected in due course of appeal—*Tejrám* v. *Harsukh*(a); and where no appeal is permissible, there would be no remedy under section 622 of the Code or under the provisions of section 15 of the Statute 24 & 25 Vic., c. 104, whatever remedy there might be, in this Presidency, under clause 2 of section 5 of Regulation II of 1827. But it would be otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeded to determine an issue which did not really arise in the case, and based its decision of the case on its determination of that issue. If, for instance, it took a view of the facts contended for by neither of the parties, and which was palpably wrong, then, whether its application of the law to those assumed facts were right or wrong, it would not be an application of the law to the facts of the case before it, and would be outside the case altogether. In the present case, the Subordinate Judge's decision on the question of limitation would be perfectly right and within his jurisdiction if the facts of the case were as he supposed them to be. It is a wrong and illegal decision, not as a bare determination of a question under the Limitation Act, but because the Subordinate Judge has misstated or misunderstood the obvious facts of the case and has so been led to decide an issue which he ought never to have raised. His decision of it has nothing to do with the case actually before him And by basing his decision of the case on his decision of that issue, he has, we think, acted with material irregularity in the exercise of his jurisdiction, even if he has not failed to exercise a jurisdiction vested in him.

We, therefore, make absolute, with costs, the rule granted in this case, and direct the Subordinate Judge to try the case on its merits.

Rule absolute.

(a) I. L. R., 1 All., 101.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

BA'I HARKOR, (ORIGINAL DEFENDANT), APPELLANT, *v.* MA'NEKLA'L RASIKDA'S AND ANOTHER ADMINISTRATORS OF THE PROPERTY OF THE MINOR MAGANGAURI, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1887. *November* 30.

Hindu law—Will—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), Sec. 179—Probate and Administration Act (V of 1881), Sec. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate - Parties to sue—Practice.

One Lálbhái died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in the Surat District. He left a widow, Bai Harkor, and a minor son, Maganbhái. At his death he made a will bequeathing his property to his son, and appointing certain executors to manage the property during the son's minority. The son died in 1877, leaving a minor widow, Magangauri. In 1879 one of the executors obtained probate of Lálbhái's will from the High Court.

In 1884 a suit was filed, on behalf of the minor Magangauri, against her mother-in-law, Bái Harkor, to recover possession of the property covered by the will of Lálbhái.

One of the defences to this suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor.

Held, that the executor was not a necessary party to the suit. Section 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property. On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff, in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), sec. 4, (if that Act can be held to operate at all in the Mofussil before a notification is issued under section 2), the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation.

APPEAL from the decision of Khán Bahádur B. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 8 of 1884.

The facts of this case, so far as they are material for the purposes of this report, are as follows :—

* Appeal No. 91 of 1885.

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BÁI HARKOR v. MÁNEKLÁL RASIKDÁS.

One Lálbhái Rámdás died at Surat possessed of considerable moveable and immoveable property. He died on the 21st December, 1873, leaving him surviving a widow, Bái Harkor, and an only son, Maganbhái, aged seven years.

At his death, Lálbhái made a will, bequeathing the greater part of his property, (which was mostly ancestral), to his minor son, and appointing one Ichhárám Gangádás and two other persons as executors to manage the property during the minority of his son.

In 1877 the minor Maganbhái died, leaving a childless widow, Bái Judav *alias* Magangauri.

One Máneklál Rasikdás and Bái Umiá were appointed, under Act XX of 1864, administrators of the estate of the minor widow, Bái Magangauri.

In 1879, Ichhárám Gangádás, one of the executors of Lalbhái's will, obtained probate of the will from the High Court, as part of the property covered by the will was situate in Bombay.

In 1884, Mánclál and Bái Umiá, the administrators of the estate of the minor Magangauri, filed a suit against Bái Harkor, the widow of Lálbhái, to recover possession of the moveable and immoveable property forming part of the minor's estate.

The defendant pleaded *(inter alia)* that the property in dispute was vested, under the will of Lálbhái, in his executor Ichhárám, who had obtained probate of the will; that she held the property under the executor; and that, therefore, the executor was a necessary party to the suit.

The Subordinate Judge held that the executor was not a necessary party to the suit, and on the merits awarded the plaintiffs' claim with costs.

Against this decision the defendant appealed to the High Court.

Jardine (with him *Pándurang Balibhadra* and *Ganpat Saddshiv Ráv*) for the appellant:—The High Court granted probate in 1879 to one of the executors of Lálbhái's will. The estate has, therefore, vested in the executor. Under the Probate Act (V of 1881),

sec. 4, the executor alone represents the estate of the deceased. And he is the only person, under section 179 of Act X of 1865, who can sue or be sued in respect of the estate so vested in him. He is, therefore, a necessary party to the suit. The proviso to section 4 of Act V of 1881 does not affect the case at all, as the plaintiff does not take by right of survivorship.

Shántárám Náráyan for the respondents:—The testator and his son were joint. The property covered by the will is presumably joint family property. If so, on the father's death it vested in the son by survivorship, and on the son's death it passed to his widow, the plaintiff in this suit. The case, therefore, falls within the proviso to section 4 of the Probate Act (V of 1881), assuming that that Act applies. But there is nothing to show that it has been extended to the district of Surat by any notification under section 2 of the Act. The executor is, therefore, not a necessary party to the suit.

BIRDWOOD, J.:—We are of opinion that the Subordinate Judge rightly decided that Ichhárám, the executor of the deceased Lalbhái's will, was not a necessary party to the suit. The will was made when Act XXI of 1870 was in force, and under that Act, section 179 of Act X of 1865 had no application to it so far as it related to any property out of Bombay. The property of Lálbhái did not, therefore, vest in the executor at any time before Act V of 1881 came into force. It is contended, however, that the effect of section 4 of Act V of 1881 was to vest the property in Ichhárám, and that he alone, therefore, could sue. We cannot yield to this contention, for Lálbhái and his son Magan were presumably joint in estate, and on Lalbhái's death the estate vested in Magan by survivorship. On Magan's death in 1877 it vested in his widow, the minor Magangauri on whose behalf the present suit is brought by the administrators of her property appointed under Act XX of 1864. Under the provisions, therefore, of section 4 of Act V of 1881, if that Act can be held to operate at all in the Mofussil before a notification is issued under section 2, the estate could not vest in Ichhárám, as it had passed by survivorship to another person long before the Act came into operation.

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As regards the ornaments included in list E, the evidence relied on by the defendant is vague, and we think that the Subordinate Judge rightly allowed the plaintiffs' claim to recover them.

As regards, however, the property included in list H, worth Rs. 6,329, we cannot uphold the Subordinate Judge's decision. Bái Harkor has adduced evidence (her own and that of witnesses Nos. 101, 111, 112, 176), which is not met by any evidence on the other side. She has all along consistently claimed these ornaments as having been given to her by her husband on their betrothal. The evidence relied on by her sufficiently supports her claim, which is consistent with Hindu custom on such an occasion. We, therefore, disallow the plaintiffs' claim to recover those ornaments.

The effect of this decision will be to vary the decree of the lower Court by striking out of it the paragraph relating to the ornaments in list H.

Before, however, we can make a final decree in this appeal, it will be necessary to ascertain the amount of money to be paid as an alternative if delivery of the moveable property decreed to the plaintiffs cannot be had. Section 208 of the Code of Civil Procedure, the provisions of which have been overlooked by the Subordinate Judge, requires that the decree should state this amount. The Subordinate Judge should certify a finding on this point within two months, after taking such evidence as the parties may offer.

Decree varied.

APPELLATE SIDE.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KRISHNA'JI LAKSHMAN AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VITHAL RA'VJI RENGE, (ORIGINAL PLAINTIFF), RESPONDENT.*

1887. *December 6.*

Hindu law—Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act (XV of 1877), Sec. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.

Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are:—

(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family?

(2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and

(3) Had the purchaser notice that the debts were so contracted?

Suraj Bunsi Koer v. *Sheo Proshad Singh*(1) and *Nanomi Babuasin* v. *Modun Mohun*(2) followed.

The plaintiff sued in 1883 for partition of ancestral property, consisting *(inter alia)* of certain *thikdns* which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution proceedings. In the certificates of sales granted to the different purchasers, the property sold was described as being a four-annas' share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title and interest in the above-mentioned property of the said Rávji (*i.e.* the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thikdns* in question was never disturbed, though the sharers had each a separate possession of distinct portions of the ancestral property.

Held, that under the circumstances the father's interest alone passed to the auction-purchasers.

* First Appeals, Nos. 98 and 107 of 1884 and Nos. 9 and 20 of 1885.

(1) L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.

(2) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.

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Held, further, that the plaintiff's claim with regard to eight other *thikáns* in dispute was time barred. On the sale of those *thikáns* in execution of decrees against his father, the plaintiff intervened, and obstructed the auction purchasers in obtaining possession. His obstruction was, however, removed by an order of the Court, dated 23rd October, 1873. The present suit, which was filed in 1883, not having been brought within one year from the date of that order, as required by the law then in force, the claim was clearly time-barred. The plaintiff was not entitled to a deduction of the time taken up in prosecuting a former suit, which was filed up in 1872 and disposed of in 1883; as that suit did not fail for want of jurisdiction or any defect of a like nature such as is contemplated by section 14 of the Limitation Act XV of 1877, but was withdrawn by the plaintiff himself for want of parties, with liberty to bring a fresh suit. Section 374 of the Code of Civil Procedure (Act XIV of 1882), therefore, applied to the present case.

APPEALS from the decision of L. G. Fernandez, First Class Subordinate Judge of Ratnágiri, in Suit No. 32 of 1883.

This was a suit for partition of ancestral property. The plaintiff alleged that the property in suit was joint family property, that his *bháubands* or co-sharers were in possession and enjoyment of unequal portions of the family estate, that he demanded partition, but defendants Nos. 1 to 6 objected to it.

The plaintiff further alleged that his father was possessed of considerable ancestral property which he alienated for debts contracted for immoral purposes, that his father's alienations were, therefore, not binding on him, and could not affect his two-annas' share of the entire family property.

Defendants Nos. 1 to 18 were the *bháubands* co-sharers. Defendant No. 19 was a mortgagee under defendants Nos. 14 to 18. Defendants Nos. 20 to 32 and Nos. 37 to 43 were the alienees of the plaintiff's father Rávji.

The plaintiff first filed his suit on the 8th July, 1873, in the Málvan Court. That suit was afterwards transferred to the Vengúrla Court. The Vengúrla Court returned the plaint for want of jurisdiction, and it was filed in the First Class Subordinate Judge's Court at Ratnágiri in 1880. The case was fully heard there, and when judgment was about to be delivered, the plaintiff asked for leave to withdraw from the suit, as it was defective for want of parties, with liberty to file a fresh suit

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in respect of the same cause of action. This permission was granted, and the present suit was filed in 1883.

The defendants Nos. 1 to 6 contended *(inter alia)* that four *thikáns* out of the joint property had been already assigned by the *bháubands* to defendant No. 1 as *jeshtbhág* (or share of the eldest son), and that the said *thikáns* were, therefore, not liable to partition.

Defendant No. 25 pleaded that his father purchased 34 *thikáns* at an auction-sale in execution of a decree against the plaintiff's father, the deceased Rávji Rághu; that the plaintiff and his father were joint, and the latter was the managing member—hence the sale included the plaintiff's right also; that when the defendant took possession of the *thikáns*, the plaintiff obstructed him, but his obstruction was removed by the Court on the 23rd October, 1872; that the plaintiff not having brought the present suit within one year from that date, his claim was barred by the law of limitation, and the plaintiff's father was not a man of vicious habits.

Defendants Nos. 26 and 27 pleaded that the plaintiff's father had mortgaged his one-fourth share in certain *thikáns* to one Apá Sabshet Thanavde; that the mortgagee obtained a decree against the plaintiff's father, and in execution thereof put up to sale and himself purchased three of the mortgaged *thikáns* in 1871; that Apá then sold his rights therein to the defendants in 1882; that the plaintiff's father had contracted debts for family purposes, and that, therefore, the mortgage of the aforesaid *thikáns*, the decree, and the sale affected the plaintiff's share also in the family property.

Defendant No. 31 was a purchaser of certain other *thikáns* at an auction-sale in execution of a decree against the plaintiff's father. He also pleaded that the debts contracted by the father and the sales in execution of decrees against him were binding on the son.

Defendant No. 23, another auction-purchaser, set up a substantially similar defence.

Defendant No. 37 pleaded that the plaintiff's father, Rávji,

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had mortgaged to his father his one-fourth share in 81 *thikáns* in 1868 for Rs. 3,575, and had passed two other bonds in 1869 for Rs. 649; that the plaintiff was bound to pay these sums; that Rávji's one fourth share in 18 of the mortgaged *thikáns* had been been sold by auction in execution of decrees against him; that in respect of these *thikáns* and the rest of Rávji's properties a suit was then pending in the Vengúrla Court, and that the plaintiff ought to sue to redeem.

The certificates of sales granted to the different auction-purchasers described the property sold as being a four-annas' share, which would include the shares of the father and the son together; but this description was qualified by the statement that "the right, title, and interest in the above-mentioned property of the said Rávji was sold."

The Subordinate Judge found that the plaintiff's father had incurred debt for immoral purposes; that when his creditors sued him, the plaintiff was an adult member of his family; and that as the plaintiff was not made a party to the suits filed against his father, he was not bound by the decrees or by the sales which followed thereon. As to the *thikáns* claimed by defendant No. 25, the Subordinate Judge was of opinion, that though the sales of those *thikáns* were not binding on the plaintiff, still he had lost his right to eight of them under the Court's order of 23rd October, 1872, when his obstruction to the defendant's possession was removed.

With respect to the four *thikáns* claimed by defendants 1 to 6 for *jeshtbhág*, the Subordinate Judge was of opinion that those *thikáns* were liable to partition, as held by the High Court in Special Appeal No. 526 of 1865. The agreement of the *bháubánds*, upon which the defendants relied in support of their contention, was found to have been fraudulently got up to defeat a creditor's claim against the family property; and though the plaintiff's father was a party to the agreement, the Subordinate Judge held that it was not binding on the plaintiff.

The Subordinate Judge, therefore, passed a decree in the plaintiff's favour, awarding him one-eighth of all the properties described in the plaint, with the exception of the eight *thikáns*

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in the possession of defendant No. 25, as to which the claim was thrown out as time-barred.

Against this decision the defendants Nos. 1 to 6, Nos. 23, 25, 26, 27, 31 and 37 filed appeals to the High Court.

Mahádev Chimnáji A'pte for the appellants (defendants 1 to 6).

Vásudev Gopál Bhandárkar for the appellants (defendants Nos. 26 and 27) :—The appellants are purchasers at court-sales held in execution of decrees against the plaintiff's father. Those sales are binding on the plaintiff. The certificates of sale show that a four-annas' share of the family property was sold. That includes both the father's and the son's shares. It is now settled law that the father's alienations are binding on the sons, unless they are shown to have been made for immoral purposes. The burden of proving this lies on the sons who challenge the alienations. This burden the plaintiff has not discharged in the present case. The evidence he has produced to prove his father's immorality is too vague to be acted upon. Refers to *Kastur Bhaváni* v. *A'ppá*[1] and *Saláshiv Dinkar Joshi* v. *Dinkar Náráyan Joshi*[2].

Mánekshák Jáhangirshák for the appellants (defendants Nos. 23, 25, 31 and 37) :—The material question in the present case is, what was put up to sale in execution of decrees against the plaintiff's father? Was it the father's interest only, or the entire family estate? This depends upon the nature of the father's debts. If the debts, for which the decrees were passed, were not contracted for immoral purposes, the son's interest also passes at the sale. Refers to *Nanomi Babuasin* v. *Modun Mohun*[3]. In the sale-certificates the property sold is described as a four-annas' share, which includes the father's as well as the son's interest. A purchaser is not bound to go back behind the decree. All that he has to see is that there was a decree properly obtained against the father, and that the property put up to sale is liable to be sold in execution of the decree—*Girdháree Lál* v. *Kantoo Lál*[4]. We are *bonâ-fide* purchasers. We had no notice, that the plaintiff's father contracted debts for immoral purposes. We

(1) I. L. R., 5 Bom., 621.
(2) I. L. R., 6 Bom., 520.
(3) L. R., 13 I. A., 1; I. L. R., 13 Calc, 21.
(4) 14 B. L. R., 187. P. C.

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are, therefore, entitled to protection—*Suraj Bunsi Koer* v. *Sheo Proshád Singh*[1]. The plaintiff was not a minor at the time of the sale. He lay by for nearly eleven years. He must, therefore, be taken to have acquiesced in the alienations. It is too late for him to dispute them.

Ghanashám Nilkanth for theplaintiff (respondent):—It is found by the Court below—and that finding is supported by abundant evidence—that the plaintiff's father contracted debts for immoral purposes. The son is not under a pious obligation to pay such debts—West and Buhler, (3rd ed.), page 746; Colebrooke's Digest, page 213, *Bheknáráin Singh* v. *Januk Singh*[2], *Suraj Bunsi's Case*[3]. The father's power of disposal over ancestral property is not larger than that of any other co-parcener. The *onus* of showing that the father contracted debts for family purposes lies on the creditor—West and Buhler, (3rd ed.), 166, *Kameshvar Pershád* v. *Run Bahádur Singh*[4]. The auction-purchaser at a court-sale does not acquire more than the father's share, especially where the son is not a party to the suit or to the execution proceedings. The purchaser is bound to make reasonable inquiry and satisfy himself that the decree is passed against the father as representing the family He is, moreover, bound to show that he bargained for and paid for the entire estate. The *quantum* of interest that passed at a court-sale to a purchaser is also determined by the nature of the debt for which the sale is made. If the debt is immoral, the son's interest does not pass. Refers to *Girdháree Lall* v. *Kantoo Lall*[5], *Suraj Bunsi Koer* v. *Sheo Proshád Singh*[6]; *Báboo Hurdey Náráin Sahu* v. *Pundit Báboo Rooder Perkash*[7], *Nanomi* v *Modun*[8]; *Simbhunáth* v. *Golább*[9], *Jagabhái Lalubhái* v. *Bhukundás Jagjivandás*[10].

As to that part of the claim which the lower Court has held to be time-barred, the plaintiff is entitled to a deduction of the time taken up in a former suit brought upon the same cause of

(1) L. R., 6 I. A., 88
(2) I. L. R., 2 Calc., 438, 443
(3) L. R., 6 I. A., 88
(4) I. L. R., 6 Calc., 843; L. R., 8 I. A., 8.
(5) 14 B. L. R. 187
(6) L. R., 6 I. A., 88.
(7) L. R., 11 I. A., 26
(8) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21
(9) L. R., 14 I. A., 77.
(10) I. L. R., 11 Bom., 37

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action in 1873, which eventually failed for want of parties in 1883. Section 14 of Act XV of 1877 applies to this case. Refers to *Bái Jamna* v. *Bái Ichha*[1].

PARSONS, J.:—We see no reason to dissent from the Subordinate Judge's finding that the mortgages of the plaintiff's share of certain *thikáns* by his father cannot be upheld. The plaintiff has proved that the debts were contracted for immoral purposes within the knowledge of the lenders. The alienations, therefore, cannot be held good as against the plaintiff's two-annas' share in those *thikáns*, in respect of which only he seeks to set them aside. The case, however, of those appellant-defendants who purchased at auction-sales stands on a different footing. The Subordinate Judge has disallowed their claims as against the plaintiff's share in the lands sold merely on the ground that the sales were made in execution of decrees for debts contracted by his father for immoral purposes. But, in dealing with this part of the case, the Subordinate Judge has not considered the question whether the purchasers had notice that the debts were so contracted. We think that, as regards such purchasers, the two propositions laid down in *Suraj Bunsi's Case*[2], are still in force unqualified by any later decision, and that having regard to that decision and the ruling in *Nanomi's Case*[3] the points to be determined in any such case as the present are:—

(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only or was it the interest of the entire family?

(2) Where the debts for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and

(3) Had the purchasers notice that the debts were so contracted?

The first of these points was the material point in the cases of *Baboo Hurdey Nárain* v. *Pundit Baboo Rooder*[4], *Nanomi Babuasin* v. *Modun Mohun*[5], *Simbhunáth* v. *Golál*[6], *Pettachi* v.

(1) I. L. R., 10 Bom., 604.
(2) L. R., 6 I. A., pp. 88, 106.
(3) L. R., 13 I. A., p. 1; I. L. R., 13 Calc., 21.
(4) L. R., 11 I. A., p. 26.
(5) L. R., 13 I. A., p. 1.
(6) L. R., 14 I. A., p. 77.

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Sangili[1], and the determination of it was sufficient for the decision of those cases. It is for this reason, apparently, that the second proposition in *Suraj Bunsi's Case* is not again laid down in the subsequent cases. Considering, then, the first question which arises with reference to the sales of certain *thikáns* in execution of decrees against the plaintiff's father, in the light of the cases just cited, we are of opinion that the father's interest alone is what was sold in the present case. It is nowhere stated in any of the certificates of sale that the share of the son (*i. e.* of the plaintiff) is sold. It is true that the property is described in the certificates as being a four-annas' share, which would be equal to the shares of the father and the son together, but this description is qualified by the statement that "the right, title and interest in the above-mentioned property of the said Rávji" (*i. e.* the father) is sold. The case is thus very similar to *Simbhunáth's Case*, where the interest of the father alone was held to have passed. It is remarked in *Nanomi's Case* that, if the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co-parcenery interest only, the absence of the sons from the proceedings may be a material consideration. In the present case, the plaintiff, though an adult at the time, was not a party to the suit or to the execution proceedings. Again, another very material circumstance is not established in the present case, namely, that the purchasers bargained for and paid for the entirety. Further, it is abundantly clear, from the evidence, that, as regards his possession and enjoyment of the *thikáns* in question, the plaintiff was never disturbed, and that, too, although by private agreement the sharers had each separate possession of distinct portions of the ancestral property. For this reason, then, that the interest of the father alone was sold, and not on the ground relied on by the Subordinate Judge, which, standing alone, is insufficient to justify his finding, we confirm that finding as to the sales in question, so far as they affect the plaintiff's share, which is alone claimed by him.

We think that the Subordinate Judge has rightly disallowed the plaintiff's claim to a share in the eight *thikáns* mentioned in

[1] L. R., 14 I. A., p. 84.

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Exhibit A. In the proceedings consequent on the sale of these fields the plaintiff intervened. He was given an opportunity of showing either that his share was not sold or that it was improperly sold and that the sale was not binding on him, and he failed to prove either point; and the obstruction that he made to the purchasers obtaining possession was removed. This was in 1872. Under the law then in force, he was bound to sue within a year to establish the right that he claimed—the right that is to remain in possession of his share unaffected by the auction-sale under a decree obtained against his father. In the present suit, which was not filed till 1883, he seeks to obtain a declaration of the very same right, and asks that the time taken up in prosecuting a former suit which was filed in 1872 and disposed of in 1883 may be excluded. But that suit did not fail for want of jurisdiction or any defect of a like nature, such as is contemplated by section 14 of Act XV of 1877 (see *Bái Jamna* v. *Bái Ichha*[1]). It was withdrawn by the plaintiff himself, as it was defective for want of parties, and he was allowed to bring a fresh suit. It appears, therefore, that section 374 of the Civil Procedure Code applies to the case. Inasmuch, moreover, as neither the decrees in execution of which the sales were held nor the bonds on which the decrees were obtained are filed in the present case and no evidence is adduced as to the exact character of the debts in respect of which the bonds were passed, it would not be possible for us to hold that these specific debts were contracted for immoral purposes.

The only other objection to the decree is that of the defendants Nos. 1 to 5. It refers to their claim to a *jeshtbhág* or larger share on partition. The Subordinate Judge has disallowed this claim, on the ground that the sum awarded by the agreement of A. D. 1842 to Rámchandra on account of *jeshtbhág* was provided for by the High Court's decree in a previous suit. The Subordinate Judge, however, here proceeds on a misconception both of the agreement and of the decree of the High Court. The agreement of 1842 (Exhibit No. 163) provided that "fields yielding a net profit of Rs. 30 a year (after deducting the assessment)

(1) I. L. R., 10 Bom., p. 604.

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should be assigned to R. B. Renge for *jeshtbhág* at the time of making the partition." The decree of the High Court (Exhibit 188) in the previous suit (Sp. A. 526 of 1865) also provided that the four fields claimed should be divided after an assignment had been made of an extra share for *jeshtbhág*, as stipulated in para. 2 of the agreement, Exhibit 12, (Exhibit 163 in the present case). It is, therefore, clear that the defendants are entitled to have an assignment of land from those four fields, yielding a net profit of Rs. 30 a year as *jeshtbhág*. We cannot, however, hold that they are entitled to more than that. The claim to hold the whole of these lands as *jeshtbhág* cannot be sustained. Exhibit 160, under which the claim is made, has been superseded by the decree, which alone now determines the rights of the parties *inter se* (Cf. *Rámchandra* v. *Abáji*[1]).

We, therefore, modify the decree of the lower Court by declaring that, before making the partition, land yielding a net profit of Rs. 30 a year, out of the *thikáns* Holiche Kate, Wada Maine, Dagad Kate, Khalil Khajan and Panchbhai Khajan Katuban, be divided off and assigned to the defendants Nos. 1 to 6 if no such assignment has already been made by virtue of the decrees obtained by defendants Nos. 14 to 18 for partition. In all other respects we confirm the decree.

We order that each party bear its own costs in the appeals in this Court.

Decree varied.

(1) Printed Judgments for 1886, p. 15.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás.

1888 *August* 30.

SAYAD JAFIR SA'IIEB, (ORIGINAL PLAINTIFF), APPELLANT, *v* SAYAD KADIR RAHIMAN AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS *

Municipal (Bombay) Act VI of 1873, Sec. 36, orders under—Privy, power of Municipality to order to be built by owner of a house—Such order not imperative, but permissive—Construction.

The terms of section 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are

* Second Appeal, No. 415 of 1886.

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permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised.

Accordingly, where the plaintiff complained that the defendants had erected a privy so close to his house as to be a nuisance and the lower Appellate Court found it to be as such, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the Municipality issued under section 31 of the Act,

Held, reversing the decree of the lower Appellate Court, that the Municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants, therefore, could not plead that they acted under the orders of the Municipality.

The High Court directed an injunction to remove the privy within three months from the date of its decision.

THIS was a second appeal from a decision of E. M. H. Fulton, Acting District Judge of Belgaum, confirming the decree of Ráv Bahádur Jayasatyabodhráo Trimulráo, First Class Subordinate Judge of the same place.

The plaintiff complained that the defendants had erected a privy in 1884, within the distance of five cubits from the house belonging to the plaintiff, which was a nuisance to whosoever might occupy the same. He, therefore, prayed that an order directing the removal of the privy might be made, and a perpetual injunction granted against building any privy, in future, on the same spot. He also claimed Rs. 10 as loss of rent for the house.

The defendants contended *(inter alia)* that the spot on which the privy was erected, belonged to them; that by an order of the local Municipality a pit privy attached to their house had been removed, and the present *bhangy* privy erected, and that the plaintiff had twice similarly complained to the Municipality, but his appeals to that body had been rejected by the Committee and its President.

The Court of first instance rejected the plaintiff's claim. He appealed to the District Judge, who confirmed the lower Court's decree. The following is a portion of his judgment:—

"* * * I find that the privy is a nuisance to the plaintiff such as to entitle him to sue for its removal, unless defendant can show he acted under legal obligation in constructing it in its

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present position. I have visited the place, and I think there can be little doubt that the value of the plaintiff's house is permanently impaired to some extent by the proximity of this privy. * * * Had defendant acted spontaneously in locating a new privy in this situation, I should have given the injunction applied for, as it seems to be a case where there exists no standard for ascertaining the actual damage caused or likely to be caused by the nuisance. * * * I do not think the defendant is liable to be ordered to remove the privy. Section 36, clause 1, of Bombay Act VI of 1873 provides that 'in case the Municipality shall be of opinion that any privy * * * should be provided for any house * * * they may, by written notice, call upon the owner of such house * * * to provide the same in such manner as the Municipality shall deem proper.' Although the Act does not appear to prescribe any fine for disobedience to such notice, it is none the less obligatory, for section 75 provides that, in case of non-compliance, certain steps may be taken which, as a rule, would be far more costly to the owner than those which he would have to take himself if he obeyed the notice. I think, then, that the order conveyed to the defendant imposed on him a statutory obligation to construct a privy which could be cleaned out by a sweeper, and consequently obliged him to make it in such a position as would be accessible to a sweeper. Now, of course, it may be argued that by pulling down a portion of his own house or completely altering it he might have found some other site for his privy, but I think it would be unreasonable to hold that he was bound to adopt this course. The Municipal Secretary and Mr. Anandráo appear to have carefully inspected the premises, and their evidence shows that, in the existing state of the buildings, there was no other place for this privy so as to enable it to be visited by a sweeper. I have considered whether defendant ought to have left it where the pit privy formerly stood and where he first built it, and allowed the sweeper to approach by the path in front of his zenana by the passage, to indicate which I have drawn on the map a pencil line. But to have done so would have brought the sweeper very much nearer the plaintiff's back door than he will have to go at present, and would probably have occasioned a nuisance to the latter quite

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as great as the one from which he now suffers. On the whole I think the position selected for this privy is the least objectionable which could have been chosen * * * * *."

From this decision the plaintiff preferred a second appeal to the High Court.

Ghanashám Nilkanth Nádkarni for the appellant:—The lower appellate Court has found that the privy is a nuisance, and it is not, therefore, right to reject the plaintiff's claim. The defendants ought to have constructed the privy in a way and place which would not have interfered with the plaintiff's comfort. The order of the Municipality was not such a statutory order as justified the nuisance.

Gokuldás Kálándás for the respondents:—The lower Court has considered very well in rejecting the plaintiff's claim. The ground on which the privy was built, belongs to the respondents. They had to erect a privy in suppression of the old pit-privy, and no other site was available. The duty of erecting this privy was imposed on them by the Municipality under section 36 of Bombay Act VI of 1873. It was an imperative order, and justified the nuisance. See *Metropolitan Asylum District* v. *Hill*[1].

SARGENT, C. J.:—The District Judge has found that the privy is a nuisance, but has held that the defendants have established the two propositions laid down by Lord Watson in *Metropolitan Asylum District* v. *Hill*[1] as requisite to justify such a nuisance: firstly, that he was acting under the imperative orders of the Legislature, and secondly, that he could not possibly obey those orders without injuring private rights. The defendant may have acted under the orders of the Municipality. But the terms of the Statute, Bombay Act VI of 1873, sec. 36, under which those orders were given, were not imperative in requiring the Municipality to call on the owner of the particular house inhabited by the defendants or any houses within a particular area in which the defendants' house was situated, to build a privy, but are simply permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised. In such a case Lord Watson says: "The

(1) 6 H. L. App. Cas. 193 at p. 213.

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fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights." Again, there is nothing in the Act which necessarily requires privies to be erected, although their being so erected would create a nuisance, or to lead to the inference that the Legislature supposed that they could not be erected without creating a nuisance, from which it might be concluded that the Legislature intended they should be made regardless of other persons' rights. The absence of these indications in the Act under which the power is exercised is relied on by Lord Selborne and Lord Blackburn in the case above referred to as distinguishing it from *The Directors, &c., of the Hammersmith and City Railway Company* v. *G. H. Brand*[1]. As the Municipality had, therefore, in our opinion on the proper construction of the Act, Bombay Act VI of 1873, no authority to order the defendants to erect a privy regardless of the plaintiff's rights, they cannot plead that they acted under their orders. We must, therefore, reverse the decree and direct an injunction to issue, directing the defendants to remove the privy within three months from the date hereof. Plaintiff to have his costs throughout.

Decree reversed.

(1) L. R. 4 H. L. 171

ORIGINAL CIVIL.

Before Mr Justice Scott.

1888. *April* 23.

IN *RE* LAKSHMIBÁI, WIDOW AND ADMINISTRATRIX OF VINÁYAKRÁV JAGANNÁTH SHANKARSHET, DECEASED, (PETITIONER).

Trustees' and Mortgagees' Powers Act XXVIII of 1866, *Sec.* 43, *powers of Court under.*

J. S., a Hindu, died in 1865 possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J. S., still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs. 900 *per annum*, was

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insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity, and that she had agreed, in September 1887, with one Ruttonji Bhikáji that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 *per mensem*. In October, 1887, however her adopted son served her with a notice to desist from granting the said lease. She, therefore, presented this petition to the Court under section 43 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, praying (*a*) that she might be advised whether she had power to grant the said proposed lease; (*b*) that the said lease might be sanctioned or directed by the Court; and (*c*) that the Court might give such opinion, advice or direction in the premises as the Court might think fit.

Held, that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, &c.

Held, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount, or as to the work to be done, the Court refused to give any opinion.

THIS was a petition to the High Court, under section 43[1] of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, for the

(1) Act XXVIII of 1866, Section 43.—"Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate.

"Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient.

"The trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application:

"Provided nevertheless that this Act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction: and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made."

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opinion, advice, and direction of the said Court under the circumstances set forth in the petition, which was as follows:—

"1. Jagannáth Shankarshet, late of Bombay, Hindu inhabitant, died on or about the 31st July, 1865, possessed of considerable property, both moveable and immoveable, and leaving unrevoked his last will bearing date the 1st July, 1864.

"2. The said Jagannáth Shankarshet left him surviving his only son Vináyakráv Jagannáth Shankarshet, since deceased, and no other male issue.

"3. Amongst the properties of which the said Jagannáth Shankarshet died possessed was a temple at Girgaum and a piece of garden ground opposite the same which the said Jagannáth Shankarshet had purchased in his lifetime. The particular description of the said garden ground is contained in the draft lease hereinafter mentioned. It is called Angir Baugh, and hereinafter referred to as the said charitable land.

"4. With reference to the said charitable land, the said Jagannáth Shankarshet by his said will directed as follows:—

"I further will and direct that my executors shall receive and apply the income and produce of the garden ground opposite my father's said temple at Girgaum between the cross road near Grant Road and the garden wall of the late Rámlál Thákursidás which I purchased and brought into cultivation, for the purpose of defraying the expenses of keeping up the daily *pujá*, the wages of Bráhmins, the dinner called *naivad*, the ceremony called *anushthán* in the month of *Shrávan*, and of the annual fair of the said temple and all the expenses of repairs and maintenance and all other incidental expenses attending or required by the said temple at Girgaum and the *dharmshálás* adjoining and appurtenant thereto.

"5. The said Vináyakráv Jagannáth Shankarshet, the executor appointed by the said will, during his lifetime managed the said charitable land and applied the rents and profits thereof as directed by the said testator in his said will. The said Vináyakráv Jagannáth Shankarshet died intestate on or about the 5th of October, 1873, leaving him surviving your petitioner his widow Lakshmibái and his son Bhavánishankar *alias* Bállá Sáheb. A posthumous son Rávji was subsequently born to the said Vináyakráv Jagannáth Shankarshet and your petitioner.

"6. On the 21st September, 1874, letters of administration to the estate of the said Vináyakráv Jagannáth Shankarshet were granted by this Honourable Court to your petitioner for the use and benefit of the said Bhavánishankar *alias* Bállá Sáheb and Rávji Vináyakráv and until one of them should attain full age. The said Rávji Vináyakráv died on or about the 1st of November, 1874, while still an infant, and the said Bhavánishankar *alias* Bállá Sáheb Vináyakráv also while still an infant died on or about the 28th of February, 1877, leaving his mother your petitioner as his heir and next of kin him surviving.

"7. On the 21st April, 1879, your petitioner was appointed by this Honourable Court administratrix, with the will of the said Jagannáth Shankarshet annexed, of

all and singular the goods and chattels, credits and effects of the said Jagannáth Shankarshet left unadministered by the said Vináyakráv Jagannáth Shankarshet.

"8. Your petitioner since the death of her said husband and sons respectively has been, as administratrix as aforesaid, managing the said charitable land and applying the rents and profits thereof as directed by the said will. The land has been let for cultivation, and for the last seven years along with certain other land appurtenant to the bungalow opposite to it has produced a gross rental of Rs. 1,300 *per annum* and a net income of Rs. 900 *per annum* or thereabouts attributable to the said charitable land.

"9. The said income is insufficient for the proper keeping up of the said charity and of the buildings appurtenant thereto, and in connection with the said charity a sum of Rs. 12,600 is urgently required to be expended in the following manner:—

"(1). In rebuilding a *dharmshála* for *sádhús* near the Bhaváníshankar's temple on the site of the old *dharmshála* which stood there, but owing to want of proper repairs was recently pulled down by the orders of the Municipality. In the absence of a proper and habitable *dharmshála* the *sádhus* and pilgrims who sojourn and resort to the said *dharmshála* are exposed to the inclemency of the weather.

"(2). In repairing and altering the big building attached to the said temple of Bhaváníshankar.

"(3). It is also desirable to erect a '*nobat khána*', (a building used for the purpose of beating a native drum), over the main gate of the said Bhaváníshankar's temple.

"(4). The tank, which is in the compound of the said Bhaváníshankar's temple, is out of repair and requires repairs and cleaning.

"(5). The petitioner has incurred certain expenses in connection with the last year's annual fair of the said Bhaváníshankar's temple which still remains unpaid.

"(6). The gate and compound of the said temple of Bhaváníshankar requires repairs and improvement, and *pujáris* or worshippers of the said temple are in need of separate quarter.

"(7). Accordingly, your petitioner proposes to disburse the said sum of Rs. 12,600 in the following manner." (The petition then set forth in detail various repairs, &c., contemplated by the petitioner, requiring Rs. 12,600.)

"10. In order to increase the income accruing from the said charitable land, your petitioner in or about the month of September, 1887, entered into an agreement with one Ruttonji Bhikáji Karanjáválá to let the said charitable land to him on lease for ninety-nine years, with a proviso for a renewal of the said lease for a further period of sixty years or less if so desired by the said intended lessee, at a rental of Rs. 350 *per mensem*. Your petitioner was on the 25th of October, 1887, served with a notice from the solicitor of Rávji Vináyakráv Jagannáth, your petitioner's adopted son, as hereinafter stated, requiring your petitioner to desist

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from granting the said lease. Before receiving the notice, your petitioner had entered into the said agreement. The alleged offer of Rs. 5,000 *per annum* for the said land your petitioner does not believe could have been or was *bonâ fide* made, if in fact it was made. A draft lease to carry out the said agreement has been prepared, but has not as yet been executed.

"11. Before entering into the aforesaid agreement your petitioner had received several offers from various brokers for a lease of the said land, but all such offers were at a lower rental than that offered by the said Ruttonji Bhikáji Karanjávála. The most favourable offer your petitioner obtained was from Mr. Nusserwánji Mánockji Petit, which was Rs. 300 *per mensem* for the land, including the part reserved for shops or booths during the annual fair. The brokerage upon the transaction, if carried out, would have been Rs. 1,400. The negotiations fell through, principally on account of the brokerage demanded being so large.

"12. Your petitioner believes that the terms of the said proposed lease are very favourable, and as high as a *bonâ-fide* lessee of the premises would be prepared to offer.

"13. In order to effect the purposes set forth in the ninth paragraph hereof, your petitioner has arranged with the said Ruttonji Bhikáji Karanjáválá that he shall pay the said sum of Rs. 12,600 in advance, as provided in the said proposed lease. The said purposes are necessary and proper purposes, and ought at once to be carried out in the interest of the said charity.

"14. The said Rávji Vináyakráv was adopted by your petitioner on or about the 18th of April, 1878, upon certain terms, which provided for your petitioner continuing the manager and owner of the estate of her sons and husband during her lifetime as though she had not adopted a son.

"15. After the said Rávji Vináyakráv came of age and in the year 1886 certain disputes and quarrels arose between the said Rávji Vinayakráv and your petitioner: a suit was on or about the 22nd of September, 1886, filed by him against your petitioner, being Suit No. 405 of 1886, in this Honourable Court. On the 3rd May a decree was passed in the said suit, whereby, amongst other things, Mr. Charles Agnew Turner was appointed receiver to take charge of and manage the estate of Jagannáth Shankarshet and Vináyakráv Jagannáth Shankarshet, save and except the temple of Shri Bhavánishankar and the *dharmshálá* appurtenant thereto and the vacant land situate opposite the said temple of Girgaum and specifically devised of the will of the said Jagannáth Shankarshet for the purpose of defraying the expenses of the said temple and the said *dharmshálá* and for the other purposes therein mentioned. The said vacant land referred to in the said decree is the charitable land hereinbefore referred to.

"Your petitioner prays:—

"(*a*) That she may be advised by this Honourable Court whether she has the power to grant the said proposed lease to the said Ruttonji Bhikáji Karanjáválá.

"(*b*) That her granting the said proposed lease may be sanctioned or directed by this Honourable Court.

"(c) That this Honourable Court may give such opinion, advice or direction in the premises as to this Honourable Court may seem fit."

Farran for the petitioner:—There are three questions arising on this petition, *viz.* (1) is the petitioner *de jure* and *de facto* a trustee of the charity land? (2) Is there any provision in Jagannáth Shankarshet's will to prevent the trustee from granting a lease of the land left in charity? (3) Does the law permit such a lease to be given? He referred to Tudor on Charitable Trusts, p. 204, 307; Lewin on Trusts (8th ed.), p. 546; *The Attorney General* v. *Foord*[1]; Act XXVIII of 1866, sec. 43. He also cited *The Attorney General* v. *The South Sea Company*[2]; *Manikldl Atmárám* v. *Manchershi Dinshá Coachman*[3].

Inverarity for the proposed lessee:—The only question is whether the lease would be profitable or not—*Attorney General* v. *Hungerford*[4]. There is no doubt as to the abstract power to alienate apart from special statutory or other limitation—*The Attorney General* v. *Pilgrim* [5].

Lang for Rávji Vináyakráv Shankarshet, the adopted son of the petitioner:—The Court has no power to sanction the lease. The Act gives no power, nor can the Court decide upon the rights of parties—*Re Lorenz's Settlement* [6]; *In re Samuel Maria Breveton*[7]; *Re Barrington's Settlement*[8]. This lease contains no provision as to buildings being given up at the expiry of the lease—Davidson's Conveyancing, Vol. V, p. 1; *The Attorney General* v. *Foord*[9]. There is no condition as to repair, &c.

Latham (Advocate General) for the charity:—It was never intended that on a petition of this kind the Court should decide nice questions of law or construction—Lewin on Trusts, Ch. 23, Sec. 2; Morgan's Chancery Acts and Orders, p. 103; *Re Mockett's Will* [10]; Lewin on Trusts, p. 618. There ought to be a friendly suit for the purpose of deciding the question raised—Tudor on Charities, 323—425.

(1) 6 Beav., 288.
(2) 4 Beav., 453.
(3) I. L. R., 1 Bom., 209 at p. 285.
(4) 2 Cl. & F., 357
(5) 12 Beav., 57.
(6) 1 Dr. & Sm., 401.
(7) I. L. R., 7 Bom., 381.
(8) 1 J. & H., 142.
(9) 6 Beav., 288.
(10) John, 623.

1868.

IN RE LAKSHMIBÁI.

SCOTT, J.:—This is a matter arising in chambers under section 43 of Act XXVIII of 1866. I am asked on the petition of Lakshimibái, widow of the late Vináyakráv Jagannáth Shankarshet, for my opinion, advice or direction on certain questions of management or administration of trust property of which she is trustee. Under that section a trustee may apply, without instituting a suit, to any judge of the High Court for his opinion, advice or direction, and by acting on such opinion the trustee is deemed to have properly discharged his duty. Obviously the Court under such circumstances must act with caution, and only advise in matters when the rights of the parties *inter se* are not in dispute either in law or in fact. The section is substantially the same as section 30 of Lord St. Leonard's Act, (22 & 23 Vic., c. 35.) The decisions under that section show clearly under what circumstances and within what limits the Court will give its advice, and they are collected in Seton on Decrees, Vol. I, p. 492.

The questions on which the Court has advised trustees have related strictly to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings. But disputed points of law or fact have never been included. The Court will not, for instance, construe an instrument or make any order affecting the rights of parties—*Re Lorenz's Settlement*(1) and *Re Evans*(2). Nor can affidavits be used (Lewin on Trusts, 618). The Court must advise on the facts stated in the petition alone—*Re Muggeridge's Trusts*(3). Vice-Chancellor Sir W. Page Wood in *Re Barrington's Settlement*(4) declined to give an express opinion on the details of a scheme to raise money for repairs and permanent improvements, and his language might be adopted *ipsissimis verbis* in this present matter. "This is not a case," he said "in which I can properly give an opinion, but I have no objection to express my view as to the principle involved. My reason for not giving an express opinion is, that the case goes into details, with which the Court cannot effectually deal, without having a superintend-

(1) 1 Dr. & Sm., 401.
(2) 30 Beav., 232.
(3) John, 625.
(4) 1 J. & H., at p. 143.

ing power and being informed by affidavits; and the Court has no means of exercising any controlling power over the subject-matter." As regards the section in the Indian Act, there is an express decision—*In re Samuel Marie Brereton*[1]—where the learned Judge follows the English decisions, and says: "It is no part of the duty of a Judge, under section 43 of the Trustees' and Mortgagees' Act, to give any opinion on a point on the decision of which may depend questions of right or title." The limits, therefore, within which I must confine myself have been clearly laid down both at home and in Bombay.

Now in this matter I am asked to advise the trustee—(*a*) whether she has the power to grant the proposed lease to the said Ruttonji Bhikáji Karanjáválá; (*b*) whether the Court will sanction or direct the said lease; and there is a further prayer (*c*) that the Court will advise in the premises as may seem fit. Now reading the section under which I am asked to act by the light of the above decisions, I must reply to these questions as follows:—(*a*) So far as this question involves a decision on the construction of the will to the effect that Lakshmibái is the trustee of the property, I cannot answer it. But her management seems to have been settled by the decision in the case of *Rányi Vináyakráv* v. *Lakshmibái*[2]. She is *de facto* trustee, and my answer is based on the assumption that she is also trustee *de jure*. Replying on that basis, I do not think I can say that she has power to grant this particular lease to Ruttonji Bhikáji, because it would be a decision on a question of detail and of fact without sufficient grounds for me to go upon. But I am of opinion, as a matter of general principle, that the trustee of this charitable property could make a lease—a building lease—of the land devoted to the maintenance of the trust. The property hitherto has only been used for agricultural purposes, the return has been small, and the temple and its adjuncts have been in consequence insufficiently maintained. A sufficient income for the trust would be probably obtained if the land were let for building purposes. Such portion of it as is required for the annual fair, which is one of the objects of the trust, should be reserved. The lease should be for the

(1) I. L. R., 7 Bom., 381, at p. 384.

(2) I. L. R., 11 Bom., 381.

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usual period of ninety-nine years, and should contain the usual covenants to build, repair, &c ; due provision should be made for the surrender or removal of the building at the close of the period on such terms as are customary in Bombay. The rental should be such as would make the arrangement beneficial to the trust, considering the market value of the land. I am of opinion that a lease fulfilling these conditions would be within the powers of the trustee.

As regards the money which is required to meet the expense of repairs and maintenance, it will evidently have to be raised in some way as a charge, either temporary or permanent, on the trust property. I am of opinion that such a charge, limited to the purposes of necessary repairs and maintenance of all the objects of the trust, would not be beyond the intention of the testator. But I cannot discuss any details as to amount or particular work to be done, as under this section of the Act I have no controlling power. I consequently think the sanction of the Court should be obtained to any charge.

As regards question (*b*), I have already stated that I cannot advise as to the particular lease, and I have no power under the section to sanction it. Question (*c*) I have answered already.

As regards costs, I think the petitioner and the Advocate-General are entitled to their costs out of the fund, to be taxed as between attorney and client. As regards Mr. Lang's client, he appeared on notice, and he is entitled to his cost of appearance in chambers, but exclusive of his affidavits, which ought not to have been filed. I think Mr Inverarity's client, who appeared without notice and at his own risk, had no *locus standi* in such an application as the present one. He must pay his own costs. I certify for counsel.

Attorneys for petitioner :—Messrs. *Craigie, Lynch, and Owen.*

Attorneys for other parties :—Messrs. *Crawford and Buckland*, Messrs. *Ardasir, Hormasji and Dinshaw*; and Messrs. *Little, Smith, Frere, and Nicholson.*

ORIGINAL CIVIL.

Before Mr Justice Scott

THE IMPERIAL FLOUR MILLS COMPANY, LIMITED, (PLAINTIFFS), v W T LAMB (DEFENDANT) *

1888.
May 1 and 2.

Company—Indian Companies Act VI of 1882, Sec 45—Member—Signing unregistered copy of memorandum of association—Agreement to become a member—Proposal—Acceptance—Repudiation before registration of company.

On the 13th April, 1886, Lamb signed a printed copy of the proposed memorandum of association of a projected company for ten shares which on the 3rd August was registered as the Imperial Flour Mills Company On that day, *viz*, the 3rd August, 1886, Lamb received a notice from the secretary of the company, informing him that the company had been duly registered, and requesting him to pay Rs 100 as the deposit on the shares subscribed by him. On the 5th August, Lamb replied, stating that he had decided not to take up the shares On the 6th August the secretary wrote to Lamb, stating that he had already become a shareholder, and could not withdraw On the 25th September the directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment monies be called in." On the 1st October the secretary notified to Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs 10 *per* share and the allotment call of Rs. 15 *per* share Lamb refused to pay, and repudiated his liability in respect of the shares He contended that he had never become a member of the company

Held, that the defendant was not a member of the company, and was not liable to the plaintiff's claim. The fact that he had signed the proposed memorandum of association did not make him a member, inasmuch as the document which he had signed was not the document which was registered, nor even a true copy of it Nor could the defendant be held bound as having agreed to become a member within the meaning of section 45 of the Indian Companies Act VI of 1882 The agreement which binds a party under this section must be an agreement with the company itself The company not being in existence at the date of the defendant's signing the memorandum of association (*viz.* the 16th April 1886), that signature could amount, at the most, to an application for shares to the promoters which by reason of its non-withdrawal before the registration of the company on the 3rd August became on that day an application to the company There could be no acceptance of that application until the company was registered; and the defendant withdrew his application by his letter of the 5th August The letter written by the company's agents on the 3rd August was not an acceptance. It was only a request for the payment of the deposit on the shares for which the defendant had applied, and which was required as a guarantee for the *bona fides* of the application Further, the terms of the resolution of the board of directors of the 25th September made it clear that up to that date the defendant's applica

* Small Cause Court Suit, No. $\frac{51}{4395}$ of 1888

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tion had not been made a binding agreement by acceptance. His repudiation, therefore, of the 5th August was in time, and he could not be held liable as a shareholder of the company.

Held, also, that in no case could the defendant have been bound by the letter of the 3rd August written by the agents of the company. That letter was written, not by order of the directors at a meeting duly convened and composed of the proper quorum of four. It was written by the secretary after consulting separately three only of the directors. This was an irregular proceeding, which would not bind the company or the subscribers with regard to the application on and acceptance of shares. The directors did not act as a board, nor was the consent of a quorum obtained.

RE-HEARING under section 38 of the Presidency Small Cause Courts Act XV of 1882.

The suit was filed in the Small Cause Court, and was heard by the Chief Judge of that Court, who, on the 22nd March, 1888, passed a decree for the plaintiffs for Rs. 1,086-11-0 and costs. The defendant then obtained an order from the High Court for a re-hearing under the above section of Act XV of 1882. The suit now came on before Scott, J.

The plaintiffs claimed to recover Rs. 1,086-11-0 from the defendant, being the amount of four calls of Rs. 25 per share, on ten shares held by him in the plaintiffs' company, together with Rs. 86-11-0 interest.

The defendant contended that he was not a shareholder in the company, and that his name had been improperly placed on the register; that there never had been any complete contract by him to take shares, and that his application for shares had been withdrawn before any shares were allotted to him; that the memorandum of association which he had signed was not the memorandum which was registered; and that, therefore, he had not become a member of the company by reason of his having signed the memorandum; that his signature to the said memorandum was not attested, as required by sections 11 and 39 of the Indian Companies Act (VI of 1882); that he had never signed any application for shares except the said memorandum; and that the company had acquiesced in his refusal to take up the shares, and were now precluded from making any claim against him.

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It appeared that on the 13th April, 1886, the defendant had signed a copy of the company's memorandum of association. The company was registered on the 3rd August, 1886. The memorandum of association, which was registered, was not the document which had been signed by the defendant, and it differed in some respects from that document. On the same day (3rd August, 1886,) the defendant received the following notice from the agents of the company :-

"*Bombay, 3rd August 1886.*

"Dear Sir,—We have the pleasure to acquaint you that the company has this day been duly registered, pursuant to the provisions of the Indian Companies Act of 1882.

"We will, therefore, thank you to pay into the Hongkong and Shanghai Banking Corporation the sum of Rs. 100, being deposit of Rs. 10 per share on shares subscribed by you in the above company."

To this notice the defendant replied on the 5th August as follows :—

"*5th August 1886.*

"Gentlemen,—Yours to hand this morning. As my terms of agreement expire in the course of a few months, and not knowing whether I shall stay in this country, I have decided not to take up the shares for the present."

On the next day the agents wrote the following letter to the defendant —

"*6th August 1886.*

"Dear Sir,—We have received your note dated 5th instant, and have noted its contents. You have legally become a shareholder of the company when you have signed the articles and memorandum of association, and since the company is registered, you cannot now withdraw your shares. Hoping, therefore, that you will be good enough to pay your deposit in the bank,

We remain, &c."

On the 4th September the agents wrote again to the defendant as follows :—

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"*4th September 1886.*

"Dear Sir,—We have to draw your attention to our letter dated 3rd August last, asking you to pay into the Hongkong and Shanghai Banking Corporation the sum of Rs. 100, being the deposit of Rs. 10 *per* share on ten shares subscribed by you in the above company which still remains unpaid. Please pay the same on or before the 10th instant."

To this letter apparently the defendant did not reply.

On the 25th September, 1886, the directors held their first meeting, and resolved that "the shares applied for be allotted, and application and allotment moneys be called in," and on the 1st October the agents sent the following notice to the defendant:—

"Letter of Allotment.

"*Bombay, 1st October 1886.*

"Dear Sir,—We beg to inform you that the directors of the above company, at a meeting held on the 25th day of September, 1886, have, in compliance with your request, allotted you ten shares in the company.

"You are, therefore, requested to pay the allotment call of Rs. 15 *per* share to the Hongkong and Shanghai Banking Corporation on or before the 15th instant, who will grant receipt for the same; in default whereof, interest at the rate of Rs. 9 *per cent. per annum* will be charged."

To this notice the defendant did not reply until the 11th November, when he wrote as follows:—

"*11th November 1886.*

"Sirs,—Your note to hand. I told you in my letter, some months back long before any allotment was made, that I should not take up the shares in my name, as my time is up in March. So you may take what steps you like. I am prepared to meet them, as I shall not pay them up after informing you in my first letter, unless you give me a guarantee as *per* your prospectus state as to dividend."

Notices of the subsequent calls made by the directors were duly served on the defendant, who took no notice of them, and the directors in consequence filed this suit.

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Latham (Advocate General) and *B. Tyabji* for the plaintiffs :— The defendant is bound under section 45 in one or both of two ways : first, as subscriber of the memorandum of association ; or second, as a person who has agreed to become a member of the company. As to the first point, there is no doubt that if the copy which the defendant signed had been registered he would have been bound—section 11 of the Indian Companies Act VI of 1882. The defendant's signature is attested by one Thomas Sugden, who is dead. He has attested merely by writing his initials. We submit that is a sufficient attestation. The Act does not say how attestation is to be made. The writing of initials is a sufficient attestation to wills—Williams on Executors, (8th ed.), p. 95, *note ; In the goods* of *Christian*[1]. As to signing a copy of the memorandum, see Lindley on Companies (4th ed.), Vol. I, p. 170 ; Buckley on Companies, (5th ed.), p. 45 ; *New Brunswick and Canada Company* v. *Boore*[2] ; *Smyth's Case*[3] ; *Anandji Visrám's Case*[4].

Secondly, we say that if the defendant is not bound by his signature of a copy of the memorandum of association, he is, at all events, bound as having agreed to become a member of the company. His signature to the copy of the memorandum amounted to a proposal to take shares—*A'nandji Visrám* v. *The Nariad S. & W. Company*[5]. In that view the document did not need registration. That proposal was not withdrawn until after the company had been registered, *i. e.* until after the proposal had been accepted, and it was then too late to withdraw it. It may be objected that there could be no proposal to a company not yet in existence. We contend, however, that the defendant's proposal was, until withdrawn, a continuing proposal ; and it had not been withdrawn on the 3rd August, on which day the company was duly registered. Having on that day come into existence, the company accepted the defendant's proposal and allotted him shares. The remarks of Westropp, C. J., in *A'nandji Visrám' Case*[6] must be taken in connexion with the facts of

(1) 2 Robert, 110, S.C. 7 Notes of Cas. 265.
(2) 3 H. & N., 249.
(3) Irish Rep., 2 Eq., 573.
(4) I. L. R., 1 Bom., 320.
(5) I. L. R., 1 Bom., 320.
(6) I. L. R., 1 Bom., 320.

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that case. There the signature had been withdrawn before the company was registered. The notice of the 3rd August was a formal acceptance of the defendant's proposal. Counsel cited *Spiller* v. *Paris Skating Rink Company*[1]; *Lawrence's Case*, *Kincaid's Case*[2].

Inverarity for the defendant:—On the evidence here it is clear the defendant never became a member of the company The question arises on section 45 [3] of the Indian Companies act. As to the first point, it has been decided that the signed memorandum in order to be binding must be registered—*The Guzerat S. & W. Company* v. *Girdharlál Dalpatrám*[4]. That case is binding. In that case (see p. 427) the differences between the signed memorandum and the registered memorandum were trifling, in the present case they are numerous and important. The Christian names of the signatories are different, and the number of shares for which they sign is not the same. Also the dates on which the subscribers are said to have subscribed differ We contend that signing a copy does not create membership, but here the document signed is not even a true copy

Secondly, we say there was no agreement by the defendant with the company to become a member. There could not have been any such agreement, for by clause 80 of the Articles of Association four directors were to manage the affairs of the company unless and until, under clause 99, a less number should be appointed a quorum. In spite of this provision only three directors carried on the business. Anything they did was, therefore, invalid—Lindley on Partnership, (4th ed.), p. 244. Even if the letter of the 3rd August, 1886, to the defendant was an allot

(1) L. R., 7 Ch. Div., 368. (2) L. R., 2 Ch. Ap., 412

(3) Act VI of 1882, "Section 45.—The subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed with a company under this Act to become a member of such company, and whose name is entered on the register of members, shall be deemed to be a member of the company."

(4) I. L. R., 5 Bom., 425.

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ment (which it was not) and an acceptance of a proposal made by the defendant, it was not an allotment or acceptance which could bind the defendant. There was, in fact, at that time no board of directors which could accept the defendant's proposal if he had made one. Assuming that he did so, he withdrew it on the 5th August, when there was no one who could accept it on behalf of the company—*Howard's Case*(1).

Next we say that the defendant's subscribing a memorandum of association which was not registered is not a proposal to become a member of a company afterwards formed and registered. There was then no *persona* to whom the proposal could be made. The signed document could only amount to an agreement between the signatories to take shares in the company if the company should be formed, but the company cannot take advantage of that agreement. A contract with A before its registration cannot become a contract with B after and by reason of its registration. Any of the signatories might perhaps sue for damages in case of a breach of that agreement by any other signatory. Each signatory in effect agrees to take the number of shares he subscribes for, if all the others take the shares for which they subscribe. He agrees to become a member of a company of which the others are members. If any of them fail, none of the others are bound. In this case the defendant subscribed the memorandum on the 13th April, 1886 He withdrew his signature on the 5th August, but at that time several of the other signatories had already withdrawn. He, therefore, was no longer bound and had a right to withdraw. He cannot be said to have acquiesced in their withdrawal, for he had no notice or knowledge of it. The memorandum which the defendant signed differs in several respects from the memorandum registered, *e.g.* in the dates of subscription and even in the names of the subscribers.

It is contended that the letter of the 3rd August was an acceptance of a proposal made by the defendant. It was nothing of the kind. It was merely a demand for Rs 10 payable

(1) L. R., 1 Ch., 561.

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on application for shares under clause 31 of the articles of association. That letter treats the defendant as not yet qualified to get the shares, as he had not paid the sum required. He was then evidently regarded as only an applicant and, as yet, an unqualified applicant. The letter is, therefore, not a final acceptance of a proposal.

SCOTT, J. :—This case turns upon the construction of section 45 of the Indian Companies Act VI of 1882. Mr. Lamb, on the 13th April, 1886, signed a printed copy of the proposed memorandum of association of a projected company, which on the 3rd August, 1886, was registered as the "Imperial Flour Mills Company." On the same date, *viz.* the 3rd August, Mr. Lamb received a notice from the secretary of the company notifying that the company had been duly registered, and requesting him to pay the sum of Rs. 100, "being deposit of Rs. 10 per share on shares subscribed by you." On the 5th August Mr. Lamb replied to the secretary —"Yours to hand this morning. As my terms of agreement expire in the course of a few months, and not knowing whether I shall stay in the country, I have decided not to take up the shares for the present." To this the secretary rejoined next day—"You have legally become a shareholder of the company when you have signed the articles and memorandum of association, and since the company is registered, you cannot now withdraw your shares. On the 4th September the secretary again wrote pressing for the payment of the Rs. 100. To this Mr. Lamb does not seem to have replied. On the 25th September the directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment moneys be called in." On the 1st October the secretary notified to Mr. Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs. 10 per share and the allotment call of Rs. 15 per share. To this Mr. Lamb replied somewhat tardily on the 11th November :—"Long before any allotment was made, I told you I should not take up the shares in my name; you may take what steps you like." Mr. Lamb evidently thought that his repudiation of the shares on the 5th August freed him from all liability to the company.

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The question turns entirely upon the interpretation of the section I have already mentioned, *viz.* section 45 of the Companies Act VI of 1882, which defines the persons who are to be considered to be members of a company. There are two methods by which a person can become a member: (*a*) by signing the memorandum of association, (*b*) by agreeing to take shares. As regards the first point, I am relieved of the labour of investigation by a decision of this Court. In *The Guzerat S. & W. Company* v. *Girdharldl Dalpatrám*[1] Westropp, C. J., and Melvill, J., decided that the memorandum to be signed under the corresponding section of the earlier Companies Act must be the registered memorandum of association. This decision was a confirmation of an earlier decision on this point in *A'nandji Viráni* v. *The Nariad S. & W. Company, Limited*[2]. The question was raised before the late Chief Justice, whether the signing of a true copy of the registered memorandum was not equivalent to signing the registered memorandum itself. The Court did not favour the contention, but gave no express decision on the point, as the document signed by the defendant in that case materially differed from the registered memorandum. Similarly, in the present case, what was set up yesterday as a duplicate or exact copy was proved to differ materially. The signatories were not the same in one instance; the shares subscribed for were not the same in another instance; one signatory was omitted altogether; the dates of subscription were not the same in many instances, and, in short, in my opinion the document was not a copy at all.

Now I come to the second point. The exact words of the section are important: "Every other person, who has agreed with a Company under this Act to become a member of such Company, and whose name is entered on the register of members, shall be deemed to be a member of the Company." In the case I have already referred to, the late Chief Justice lays it down that "the agreement which is to bind a party must be an agreement with the company itself." Mr. Lamb's signature on the 13th April, 1886, therefore, can, at the most, only be an *application* for shares *to the promoters*, which became by the

(1) I. L. R., 5 Bom., 425. (2) I. L. R., 1 Bom., 320 at p. 328.

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fact of there being no withdrawal before the registration, an application *to the company* on the 3rd August. There could be no acceptance of this application until the company was registered on the 3rd August. Was this application accepted before or after the 5th August, when Mr. Lamb wrote that he did not want the shares at all? Now it is clear on the decisions that in ordinary cases of an application for shares there is no agreement in the absence of allotment and notice of it to the applicant: see Lindley on Partnership (4th ed.), p. 100 and p. 1372; Buckley on Companies (5th ed.), p. 54; *Pellatt's Case*[1]. In the present case, withdrawal undoubtedly preceded allotment. "But," says Mr. Lindley, p. 104 (4th ed.) "acceptance may be evidenced otherwise than by an actual allotment." Although the withdrawal in this case, preceded the allotment, I have, therefore, still the question of acceptance to examine. It was argued that the notification of registration on the 3rd August, coupled with the demand for the payment of the usual deposit, was equivalent to acceptance. The definition of what amounts to an "acceptance of shares" is to be found in article 8 of the company's own articles. It is as follows:—"An application signed by or on behalf of the applicant for shares in the company followed by an allotment of any shares therein shall be an acceptance of shares within the meaning of these articles; and every person who thus otherwise accept any shares and whose name is on the register shall for the purpose of these articles be a shareholder." Has Mr. Lamb otherwise accepted the shares? Are there such special circumstances in this case as to prove a binding agreement before allotment? The only special circumstance is the letter of the 3rd August. That letter was written not by order of the directors at a meeting duly convened and composed of the proper quorum of four. It was written by the secretary after consulting separately three only of the directors, and what passed was given in evidence here by the secretary himself. "In the case of each of the three directors," the secretary says, "I told him the company was now registered with the consent of all the directors, and I asked if I should send a letter to all who had signed the memorandum of association for

(1) L. R., 2 Ch., 527.

the Rs. 10 deposit call, and he agreed." This was clearly an irregular proceeding which would not bind the company or its subscribers in such an important matter as the application for and acceptance of shares—*Howard's Case*(1). The directors did not act as a board, nor was the consent of a quorum obtained.

But it is not necessary to rest my decision on the irregularity and want of authority. The consent was not obtained to any application for shares, nor was there any acceptance of any particular offer to take shares. The letter itself does not amount to more than a request for the deposit on the shares applied for. That deposit is usually made before or at the time when the application is sent to the directors. But in this case there was no actual application—only a signature which became an application when the company was registered. So that the deposit had to be called in by the company. But it was only the ordinary deposit money required as a guarantee of the *bona fides* of an application for shares. The resolution of the Board, which is contained in the minutes of the meeting of the 25th September, puts the real meaning of the letter of the 3rd August beyond all doubt. The resolution is as follows:—Resolved that the shares *applied for* be allotted and *application* and allotment moneys be called in." It is quite clear that up to that date Mr. Lamb's application had not been made a binding agreement by acceptance. This repudiation, therefore, of the 5th August was in time, and he cannot be held liable as a shareholder of the company. The company must pay the costs, including the costs of the application for a rehearing.

Attorneys for the plaintiffs:—Messrs. *Bomanji and Hormasji*

Attorneys for the defendant:—Messrs. *Macfarlane, Edgelow, and Hemming.*

(1) L. R., 1 Ch., 561.

ORIGINAL CIVIL.

Before Mr Justice Farran.

1887. June 14.

HAJI FAKIR MAHOMED, (PLAINTIFF), v SHAIK ABDULLA, (DEFENDANT) *

Specific performance—Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice

On the 26th February 1886 the defendant purchased a house from C for Rs 4,500 and paid C a considerable portion of the purchase money Before the transaction was completed and the conveyance executed, the defendant on the 23rd June, 1886 by an agreement, in writing of that date, agreed to sell the house to the plaintiff at an advanced price of Rs 4,800 The defendant was anxious that the sale should be completed in a short time as the draft of the conveyance by C to himself had been prepared, though not finally approved and the house was in bad repair and in a somewhat dangerous condition He had applied to the Municipality for leave to repair the house, and the monsoon season had begun Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement (23rd June, 1886) and this was duly inserted in the agreement During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete saying that he had not the money with him After some hesitation the defendant extended the time to the 10th August. On the 21st July, at latest, the drafts of the conveyance from C to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff On the 23rd July he wrote to the plaintiff, reminding him that the time to complete would expire on the 9th or 10th of August and requesting him to be prepared then to complete the purchase, otherwise he would consider the agreement of the 23rd June to be null and void and would himself begin to repair the house The plaintiff sent no reply to this letter but at an interview with the defendant told him that he was considering the matter He, however, took no steps in the matter beyond getting a draft conveyance prepared The deed of conveyance by C to the defendant was ready for execution on the 3rd August Matters remained in this state until September On the 7th September the defendant through his solicitors served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June, and giving him notice, that, in default of compliance within four days, he would consider the agreement at an end The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from C without reference to the plaintiff If the plaintiff had been ready to complete the purchase, the conveyance to him by the

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defendant and the conveyance by C. to the defendant would have been executed simultaneously. Immediately after taking the conveyance from C., the defendant began to repair the house. When the repairs were almost complete, the plaintiff on the 5th October, 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June, 1886. The defendant refused, and the plaintiff filed this suit for specific performance.

Held, on the evidence, that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant.

Held, also, that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time—*Barclay* v. *Messenger*(1). The defendant's letter of the 24th July was but a timely warning to the plaintiff that the contract would not be kept in suspense after the extended time had expired. The plaintiff though thus warned took no steps to complete, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by.

It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting, and purported to put an end to it if not completed within four days; that the time so allowed was unreasonable; that the defendant, in fact, by that letter waived the plaintiff's previous default, and gave the plaintiff a fresh starting point.

Held, that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver could not be relied on—*Barclay* v. *Messenger*(2); *Stewart* v. *Smith*(3).

Quære—Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable.

SUIT by vendee for specific performance.

The plaint stated that by a contract dated the 23rd June, 1886, the defendant agreed to sell to the plaintiff a certain house situate in Masjid Cross Lane, in Bombay, for Rs. 4,850, and that the defendant subsequently refused to carry out the contract. The plaintiff prayed for specific performance of the contract.

The material part of the contract was as follows:—

"There is one house situated in Masjid Cross Lane. * * * The said property has been from before up to this day in the occupation of Jamilábibi, the widow of

(1) 43 L. J. Ch., 449. (2) 43 L. J. Ch., 449. (3) 6 Hare., 222.

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Mahomed Syed Chimkár, and her children and tenants. * * * By a writing, *i.e.* the bargain paper dated the 25th February, 1886, I have contracted to purchase from the said Jamilábibi, the widow of Mahomed Syed Chimkár, Gulám Ahmed bin Mahomed Syed Chimkár, Abdul Kádar bin Mahomed Syed Chimkár, Gulám Mohidin bin Syed Chimkár, Fátmábibi, daughter of Mahomed Syed Chimkár, and Aminábibi, daughter of Mahomed Syed Chimkár, the said property, *i.e.* the house together with the land bounded on the four sides as thus mentioned, for Rs. 4,500, namely four thousand and five hundred. I have this day made this bargain to sell to you the said house subject to the terms and conditions mentioned in the said bargain paper The price thereof has been fixed at Rs. 4,850, namely four thousand eight hundred and fifty. Out of the same I have this day received from you Rs. 350, namely three hundred and fifty, in cash as earnest (money), and as to Rs. 4,500, namely four thousand and five hundred, which shall remain due out of the same Rs. 2,400, namely two thousand and four hundred, I am duly to receive at the time of the execution of the deed of sale in the Registry Office. And at that very time I am duly to get, according to the terms of the said bargain paper, the transfer in respect of the mortgage-deed for Rs. 2,000, namely two thousand, settled, and as to balance of Rs. 100, namely one hundred, remaining due from you the same you shall duly pay on my behalf to the said Jamilábibi Gulám Ahmed, Abdul Kádar, Gulám Mohidin, Fátmábibi and Aminá bibi after the said house shall have been transferred to your name in the assessment books of the Collector (of Land Revenue). As to the charges for writing the conveyance or assignment which you may get prepared in respect of the said sale and for stamps and for registration, whatever the same may amount to, all those are duly to be paid equally by me the vendor and you the purchaser half and half. And as to bills for the said house, releases, attorney's bills and whatever other papers relating to the same which I may receive from the said Jamilábibi and others, all those I shall duly give to you at the time of the execution of the deed of sale, and according to the condition (mentioned) in the said bargain (paper) I shall take possession of the said house on that very day and similarly I am duly to hand over the same accordingly to you. Agreeably to the terms of the said bargain (paper) I am duly to give possession of the said house (to you) after getting everything cleared. This bargain has been made through brokers Mahomed Hussen Chinde, Abdul Guffur Ghansar, and Mahomed Hussen Murke. I, *i.e.* the vendor, am duly to pay their brokerage at the rate of one *per cent.*, and you, *i.e.* the purchaser, shall duly pay the said brokers Rs. 21, namely twenty-one, in the lump. *The time fixed in respect of this bargain is 12, namely, twelve days.* Within that period I am duly to hand over the said house in the same state in which it is this day. I have of my free own will and pleasure and in sound mind written and delivered this bargain paper. It is duly agreed to and approved of by me, my guardian, heirs, and representatives. The 23rd of June, the English year 1886."

The defendant admitted the making of the agreement, but contended that in consequence of the plaintiff's conduct he (the defendant) had become entitled to rescind, and that he had done

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so, and that the plaintiff was not now, therefore, entitled to have the contract enforced against him.

The defendant's case was that on the 26th February, 1886, he had himself agreed to purchase the house in question from the Chimkár family for Rs. 4,500; and that on the 23rd June, 1886, he entered into the agreement to sell it to the plaintiff for the advanced price of Rs. 4,850. At the time of this last agreement the conveyance to himself had not been executed, but was nearly ready for execution. As the house was in bad repair, and the monsoon season had begun, he stipulated with the plaintiff that the purchase should be completed within twelve days from the date of the agreement (23rd June, 1886), the arrangement being that the conveyance of the house by the Chimkárs to him and the conveyance by him to the plaintiff were to be executed at one and the same time.

Before the expiration of the twelve days mentioned in the agreement it was agreed that the time for the completion of the purchase by the plaintiff should be extended for a month, *viz.* to the 10th August.

On the 24th July, 1886, the defendant wrote the following letter to the plaintiff:—

"After compliments be it known to you that I made a contract on the 26th February with the heirs of the late Mahomed Syed Chimkár with certain conditions to purchase from them the house situate in what is now called Nizámpura. On the 23rd June, 1886, you made a contract with me for the purchase of the said house on the same terms for Rs. 4,850. Before the expiration of the time mentioned in your contract for the completion of the purchase a further extension, for which you had applied to me for completion of the purchase, was granted to you which will expire on the 9th or 10th August. There being no walls on either side of the said house it is now in a very dilapidated state, and it is necessary that immediate repairs should be made to it. And the heirs of Mahomed Syed Chimkár are pressing very hard. I, therefore, write to you that you should prepare your necessary documents and get them approved by me, and complete the purchase in the said time. If you do not, I will, after the said period, consider your contract of the 23rd June as cancelled, and will proceed with the repairs, and under the circumstances the earnest-money paid by you will not be returned to you. On the contrary you will be responsible for the damage which will be sustained (by me)."

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To that letter the plaintiff sent no reply, but at an interview he subsequently had with the defendant he stated (as the defendant alleged) that he could not complete for want of money. On the 7th September, 1886, the defendant caused his solicitor to write the following letter to the plaintiff:—

"We are informed by our client Shaik Abdulla bin Mahomed Chábuk Sowár that by an agreement made between you and our said client in the Gujaráti language, dated the 23rd day of June last, you agreed to purchase from our said client the house in 8 Nizámpura Street in terms of the agreement under which he has agreed to purchase the same from the representatives of the late Mahomed Syed Chimkár of the 23rd February, 1886, for the price or sum of Rs. 4,850. That although the time within which you were under your aforesaid agreement bound to get the necessary documents in respect of the said purchase prepared and executed expired long ago, and notwithstanding his application to you in writing on the 24th day of July last you have failed to carry out the said agreement of the 23rd June last.

We are informed that, owing to your neglect to carry out your part of the said agreement of the 23rd June, our client has sustained heavy loss, and his vendors threaten our client with proceedings for the performance specifically of his agreement of purchase with them. Our client, therefore, requires you to specifically carry out your part of the said agreement of the 23rd June last and to make good the damages which our client has already sustained, and we have to give you notice that should you fail to comply with the above requests within four days from the service hereof our client will consider the said agreement of the 23rd June at an end, and you will forfeit the earnest-money paid by you at the execution of the agreement, and he (our client) will take such steps against you as he may be advised to require from you the damage and loss that he (our client) has already sustained and may hereafter sustain.

"Yours truly,

TYABJI AND DÁVÁBHÁI."

The plaintiff sent no reply to that letter, and (according to the defendant) took no steps to complete the sale. When four days had expired, the defendant, considering his contract with the plaintiff to be at an end, completed his purchase from the Chimkárs without reference to the plaintiff, and at once began to repair the house. He alleged that he spent upwards of Rs. 1,200 on the repairs, and he claimed to be repaid the said sum in case the Court should decree specific performance of the contract with the plaintiff.

On the 6th October, 1886, when the repairs were almost complete, the plaintiff through his attorneys called upon the defend-

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ant to execute a conveyance of the house, and to perform the contract of the 23rd June, and on the 7th January, 1887, he filed this suit.

In his evidence the plaintiff swore that he was always ready and willing to complete the purchase, and that the delay was wholly due to the defendant. He denied that he had ever received the above letters of the 24th July and the 7th September.

Macpherson and *Inverarity* for the plaintiff:—They cited *Green* v. *Sevin*[1]; *Crawford* v. *Toogood*[2].

Lang and *Kirkpatrick* for the defendant:—They cited *Nott* v. *Riccard*[3]; *Macbryde* v. *Weekes*[4]; *Barclay* v. *Messenger*[5]; *Howe* v. *Smith*[6]; Fry on Specific Performance (2nd ed.), pp. 466, 469.

24th June, 1887. FARRAN, J.:—The plaintiff in this case seeks to enforce against the defendant specific performance of a contract dated the 23rd June, 1886, by which the defendant agreed to sell to the plaintiff a house, No. 8, in Masjid Cross Lane which the defendant had contracted to purchase from Jamilabibi, the representative of the Chimkár family. The defence is that the defendant is entitled to rescind and did rescind this contract, and that the plaintiff is, therefore, not now entitled to have the same enforced. There is a subsidiary question whether, assuming the plaintiff to be entitled to enforce the contract, he can do so without allowing to the defendant the sums expended by the latter on the repairs of the house.

The main issues raised were:—

1. Whether the plaintiff was ready and willing to carry out the agreement in the plaint mentioned within the time fixed by the parties for the completion thereof.

2. Whether the defendant was entitled to rescind the said agreement, and whether he lawfully rescinded the same.

Under the defendant's contract with the Chimkárs he was to pay Rs. 2,500 in cash and was to execute a mortgage of the premises in their favour for the balance of Rs. 2,000 payable in two

(1) L. R., 13 Ch. Div., 589.
(2) I. R., 13 Ch. Div., 153.
(3) Beav., 307.
(4) 22 Beav., 533.
(5) 43 L. J. Ch., 449.
(6) L. R., 27 Ch. Div., 89.

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years. This contract has not been put in evidence. The contract sued upon (Exhibit B) addressed by the defendant to the plaintiff is, in effect, as follows, the portions immaterial to the questions at issue being omitted.

"There is one house, No. 8, in Masjid Cross Lane. By a bargain paper dated the 25th of February, 1886, I have contracted to purchase the said property from Jamilábibi, Gulám Ahmed Chimkár (and the other members of the Chimkar family naming them) for Rs. 4,500. I have this day made this bargain to sell to you the said house subject to the terms, &c., conditions mentioned in the said bargain paper. The price thereof has been fixed at Rs. 4,850. Out of the same I have this day received from you Rs. 350 as earnest, and as to Rs. 4,500, which shall remain due out of the same Rs. 2,400, I am duly to receive at the time of the execution of the deed of sale in the Registry Office, and at that very time I am duly to get according to the terms of the said bargain paper the transfer in respect of the mortgage-deed for Rs. 2,000 settled. And as to the balance of Rs. 100, the same you shall duly pay on my behalf to the said Jamilábibi, &c., after the house shall have been transferred to your name in the assessment books of the Collector. As to the charges for writing the conveyance or assignment which you may get prepared in respect of the said sale, &c., for stamps, &c., for registration, whatever the same may come to, all these are duly to be paid equally by me the vendor and you the purchaser half and half. And as to the bills and papers relating to the said house which I may receive from Jamilábibi and others, all those I shall duly give to you at the time of the execution of the deed of sale. And according to the condition mentioned in the said bargain paper, I shall take possession of the said house on that very day, and similarly I am duly to hand over the same accordingly to you. I am duly to give possession of the said house to you after getting every thing cleared. This bargain paper has been made through brokers Mahomed Huson Murke, Abdul Guffur Ghausar and Mahomed Huson Chinde. *The time fixed in respect of this bargain is 12, viz. twelve, days.* Within that period I am duly to hand over the said house in the same state in which it is this day."

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The material facts in the case I hold to be proved as follows:— When the contract was being settled, there was some discussion as to the time to be fixed for its performance. The defendant suggested four or five days; the plaintiff wanted a month; twelve days were ultimately settled and inserted in the contract. The defendant was anxious to fix a short time, as the drafts of the documents to be executed by the Chimkárs had all been prepared; and though they had not been formally approved by the Chimkárs, there was no difficulty raised by them about the terms and because the house was in very bad repair and in a somewhat dangerous condition. The defendant had shortly before applied to the Municipality for leave to repair the house, and on the 31st May had been informed that no leave was necessary (Exhibit No. 2). The plaintiff during the twelve days agreed upon for performance took no steps to have his conveyance prepared, but during their currency asked the defendant for a month's time to complete, saying that he had not the money with him. The defendant after demurring for some time allowed an extension, which expired on the 9th or 10th of August following. On the 21st July at latest, the drafts of the documents which were to pass between the defendant and the Chimkárs were all formally and finally approved, and the defendant was then in a position and anxious to complete with the plaintiff, and accordingly on the 24th July he got his son to write in his name to the plaintiff a letter of that date of which Exhibit No. 3 is a copy. The letter after referring to the contracts of the 26th February and of the 23rd June proceeds thus:—

"And before the expiration of the time fixed in your said agreement for completing the said agreement I at your request gave you further time to complete the sale of the said house, which further time will expire on the 9th or 10th of the month of August next. And as the said house is now in a ruinous state there being no walls on both the sides, and as it is necessary to repair the same quickly, and as the heirs of Mahomed Syed Chimkár are making a pressing demand, I therefore request you to cause to be prepared within the fixed time such your documents as are to be prepared and to have the same approved by

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me and to complete the sale. Otherwise after the expiration of the said time I will consider your said agreement of the 23rd June to be null and void and I will commence to repair the said house, and in this case the earnest-money paid by you will not be repaid to you. Nay, whatever damages may be sustained in consequence thereof will be recovered from you."

This letter was duly delivered to the plaintiff. He sent no reply to it, but a few days afterwards the defendant met him and asked him whether he had received the letter, and urged him to be quick. The plaintiff then told the defendant that he was considering the matter. He also told the defendant at the same or subsequent interview that he (the defendant) need not be afraid that he had spoken to the Chimkárs, but that in effect he could not complete at once, as his money was with other merchants.

After receiving this letter of the 24th July, and no doubt in consequence of it, the plaintiff got the Chimkárs' drafts, which were then approved, and he and the brokers M. H. Murke and Abdul Guffur took them to the pleader Mr. Shámráv Mánockji and got him to prepare a draft conveyance, Exhibit P. The plaintiff, however, took no further steps beyond getting the draft conveyance drawn (or possibly engrossed Exhibit G); he did not even send it to the defendant for his approval. The Chimkars' drafts were apparently engrossed on the 3rd August.

Nothing thus remained to be done by the defendant but to execute the Chimkárs' documents and those of the plaintiff, and thus to wash his hands of the whole transaction, upon which he would have made, after paying his share of the expenses, but a very small profit. There is no reliable proof to show that the Chimkárs were, in fact, pressing the defendant to complete. They knew of the defendant's contract with the plaintiff, and probably for that reason were not in a hurry. They had received a considerable portion of their purchase-money from the defendant, and I am inclined to think rather played into the plaintiff's hands.

Matters remained in this state until September. On the 7th of that month the defendant served a notice, through Messrs. Tyabji and Dáyábhái, on the plaintiff of which Exhibit No. 6 is

the press copy. That letter, after referring to the contract of the 23rd June and to the defendant's letter of the 24th of July, complains that the plaintiff had failed to carry out the agreement, and continues thus:—

"We are informed that, owing to your neglect to carry out your part of the said agreement of the 23rd June, our client has sustained heavy loss, and his vendors threaten our client with proceedings for the performance specifically of his agreement of purchase with them. Our client, therefore, requires you to specifically carry out your part of the said agreement of the 23rd June last, and to make good the damage which our client has already sustained. And we have to give you notice that, should you fail to comply with the above request within four days from the service hereof, our client will consider the said agreement of the 23rd June last at an end, and you will forfeit the earnest-money paid by you at the execution of the agreement, and our client will take such steps against you as he may be advised to recover from you the damage and loss that he our client has already sustained or may hereafter sustain."

On the evening of the same day the plaintiff came to the defendant's house and said to the defendant, "Why did you send me a notice? I am trying to pay you." He asked for further time—a fortnight or twenty days, when he said he would complete. The defendant refused to give any further time, but told the plaintiff that if he wanted any further time, to send a written reply stating what time he wanted, meaning that he would only consider the application if made in the formal manner. The plaintiff to that said nothing, and left. Chinde giving an account of the same interview says, "The plaintiff said you have sent me a notice which I have received. Why did you send it? I will settle it all in a few days if you give me time." The defendant said, "I have sent a notice through a *vakil*. I don't want further to discuss the matter. If you want to say anything you should do it through your *vakil*." Nur Mahomed Kashmiri, who says he also was present at this interview, says that the defendant refused to give any further time, saying to the witness that the house was in danger. Before the expiration of the four days

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mentioned in the notice, *i. e.* of the 7th September, the plaintiff took no steps to complete the contract, and sent no reply to the defendant's notice. When the four days expired without the plaintiff sending a reply, or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th of September completed his purchase from the Chimkárs without further reference to the plaintiff. The reason why the plaintiff did not complete at the time was, I consider, because his money was locked up in his business. If he had been ready to complete, his documents and the Chimkárs' documents would all have been executed simultaneously.

Almost immediately after the completion of his contract with the Chimkárs—probably on the 14th, 15th, or 16th of September, the defendant began to repair the house, and for that purpose to dig the foundations for a side wall. The plaintiff is the owner of the immediately adjoining house, and it was for this reason that he was anxious to buy the house in question, so that he might alter his own house without objections from the occupants of the adjoining house. While the defendant was digging the foundations for the side wall, the plaintiff came and complained that his land had been encroached upon. A boundary line was eventually drawn by the defendant's builder, which satisfied him, and the work of building the wall proceeded. I shall consider presently the evidence as to whether at this time the plaintiff insisted on his agreement for purchase being in existence, and whether he required the defendant to desist from proceeding with the repairs. He did not tender any conveyance to the defendant, or offer to pay him the purchase-money

When the main portion of the repairs had been completed, the plaintiff on the 5th October, 1886, sent a solicitor's notice to the defendant requiring him to specifically perform his contract with the plaintiff The defendant under the above circumstances refused to do so. A correspondence ensued, and this suit was filed on the 7th January, 1887

It will be observed that the above statement of facts is based upon the evidence given by and on behalf of the defendant, supplemented by the endorsements and the documents put in by

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the plaintiff and by the evidence of the pleader whom he has called. The account given by the plaintiff is wholly different. I am quite unable to accept his version as trustworthy, or to regard the witnesses whom he has called as witnesses of truth, other than the witness Shámráv and those who have given but formal evidence. The plaintiff in the first place denies that the notice of the 7th September was ever served upon him, and that he ever received the defendant's letter of 24th July; it was not and could not have been disputed that the notice of the 7th September was written on that day by the defendant's instructions in the office of Messrs. Tyabji and Dayabhái. Its press copy appears in its proper place in the press-copy letter book of that firm, and the defendant and Mahomed Husson Chinde both affirm that it was written on that day. The defendant says that it was sent out for service on this same day by a clerk of the firm accompanied by Mahomed Husson Chinde, The clerk, Abdul Rahman Chimkár, was called, who swears that he served the notice on the plaintiff near his shop. The clerk next day made an endorsement of service, in the usual course, in the press-copy letter book. It appears there in proper form. This witness is quite independent. It is almost impossible to believe that he gave false evidence and forged an endorsement without at least some object, and none is suggested. He is corroborated by Chinde. They were cross-examined skilfully as to details, and no discrepancy between their statements was brought out. Chinde, though an intimate friend of the defendant, seemed to be a respectable witness. The improbability of the defendant getting such a notice written and not serving it is very great. If the writing of and the not serving this notice was an elaborate scheme, the sending of it would have been prominently brought out in the first letter the defendant got written in answer to the plaintiff's demand. It is not so, but is only noticed in the latter correspondence. Gulábchand proves that it and the letter of 24th July were both brought to his notice when he drafted Exhibit D.

Against all this I have to weigh the bare denial of the plaintiff. I have no hesitation in disbelieving it. The notice of the 7th

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September refers to the defendant's Hindustáni letter of the 24th July. This alone goes a long way towards proving that that letter was sent. That it was delivered to the plaintiff, is proved by the defendant, who says that he gave it to his son Mahomed accompanied by Chinde to take to the plaintiff and by Mahomed and Chinde who say they took it. The boy Mahomed impressed me very favourably, and Chinde's being sent with him and with the subsequent letter of the 7th September is accounted for by the fact that he was defendant's broker in this transaction, Abdul Guffur being the plaintiff's. The date of this letter dovetails neatly with two other dates relied on by the plaintiff, the final approval of the drafts by the Chimkárs on the 21st July and the plaintiff giving instructions for the draft conveyance to Shámráv at the end of that month. The defendant is probably in error that the drafts had been approved by the Chimkárs when he made the contract with the plaintiff. He was not positive on the point. The drafts were, no doubt, then ready for approval. The defendant is more probably skilled in training horses than in the intricacies of legal conveyancing.

The fact of these two letters being sent to the plaintiff and not replied to, cuts the ground, so to speak, from under the plaintiff's whole case. There are, moreover, other reasons for distrusting it. That case is that the plaintiff was very anxious to purchase this house; that the Chimkárs were on hostile terms with him, and would not sell to him; that when he agreed to purchase the house from the defendant he had the purchase-money lying idle by him, and continued so to put off until he filed this suit. His case further is that after his contract he was constantly pressing the defendant to complete, but that the defendant put him off from time to time, at first saying that the Chimkárs delayed approving the drafts and that they had to be kept in ignorance of the plaintiff's purchase from him, and subsequently that the Chimkárs had heard of the plaintiff's contract and for that reason refused to complete, and that he was not informed when the Chimkars did in fact complete, but when he heard of it he at once sent the notice of the 6th October to the defendant. That the plaintiff was anxious to purchase the house, is no doubt true, and probably for the

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reason he has stated. That the Chimkárs were on hostile terms with him, and did not wish that he should become the owner of their house, is not supported by evidence. No doubt they wrote to him in June, 1885, complaining that he was interfering with their ancient lights, &c., but he desisted and nothing more was done in the matter. The plaintiff says that the Chimkárs were unfriendly to him. The defendant and Chinde say that there is no ground for that allegation, and point in proof to the fact that the contract between the defendant and the Chimkárs, which was executed in their house, was attested by the plaintiff. This is not explained by the plaintiff That it was intended to keep the plaintiff's contract concealed from the Chimkárs, I believe to be quite untrue. The terms of the contract itself and its general tenor show this not to be so. The defendant says that the Chimkárs were informed throughout. If it had been intended to conceal it from them, a Chimkár would hardly have been selected to serve the notice of the 7th September on the plaintiff. It is true that the plaintiff had a sum by him in February sufficient to purchase the house, but that he continued to keep it ready, rests on his own assertion. About the time when he was called on to carry out the contract, he opened a second piece-goods shop. This may possibly account for his statement to the defendant that his money was locked up. It is unaccountable, if his case as to the money be true, that from June to October he should not have hastened the defendant's action by a single written request to complete, and should have rested content with the silly pretexts for delay he puts in the mouth of the defendant. The plaintiff's evidence is certainly not strengthened by calling such a witness as Fukrudin. Abdul Guffur, who is put forward as an independent witness, turns out to be the plaintiff's quondam partner and present hanger-on. The plaintiff's evidence as to his not having had a partner is suspicious when it is contrasted with that of his witness Fukrudin Mahomed Husson Murke, the real broker in the transaction, is not forthcoming to give evidence though he has been summoned Why, I know not. The plaintiff has not asked that further steps should be taken to compel his appearance. Altogether the plaintiff's case is wholly unsatisfactory. It is, on the other hand, in-

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conceivable that the defendant would have proceeded to repair his house, unless he *bonâ fide* believed the plaintiff's contract to be at an end. For the above reasons I accept his account and proceed to consider whether it affords a good defence, in law, to the plaintiff's claim.

Having regard to the circumstances under which the plaintiff's contract was made and to the nature of the property sold by the defendant, I find it impossible to hold that the time stipulated for its performancewas merely a "formal term and immaterial to the contract." The defendant, when the contract was made, had not had the property conveyed to him, but had paid a considerable portion of the purchase-money, and was in *quasi* possession. The house was in a ruinous, if not a dangerous, condition; it was at the setting in of the S.-W. monsoon. The defendant's object in re-selling was to get rid of all responsibility and liability to repair: accordingly we find that the time for performance was discussed between the parties. The defendant wanted to fix the shortest possible time for completion. The plaintiff sought for a month. Twelve days were finally fixed on as a reasonable time. The condition of the house brings the case, I think, within the principle of the authorities referred to in Fry on Specific Performance (2nd. ed.), secs. 1049-1052, 1056 and 1059 (see pp. 466 to 469).

The extension of time granted, at the plaintiff's request, to the 10th August operated, I consider, only as a waiver to the extent of substituting the extended time for the original time, and did not effect a destruction of the essentiality of the time—*Barclay* v. *Messenger*[1].

If I am correct in this view, the defendant's letter of the 24th July was but a timely warning to the plaintiff that the defendant would insist on his strict right, and would not allow the plaintiff to keep the contract in suspense after the extended time fixed for its performance had expired. The plaintiff, however, took no steps to complete though thus warned of the defendant's intention, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by.

(1) 43, L. J. Ch., 449

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Such was, I think, the legal position of the parties on the 7th September, when the defendant through his solicitors sent his letter of that date. It is contended that that letter treats the contract as then still subsisting, and purports to put an end to it if not completed within an unreasonably short time, *viz.* four days; that the defendant in fact by that letter waived all the plaintiff's previous default, and that the letter gave the plaintiff a fresh starting point. The letter may not be judiciously worded, but I do not think that its effect is as contended for by the plaintiff. The letter is only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver cannot be relied on: see *Barclay* v. *Messenger*[1]; *Stewart* v. *Smith*[2]. I am not, however, prepared to hold that under all the circumstances of this case, and assuming time not to have originally been of the essence of the contract, the four days' time limited by that letter was unreasonable. English cases, in which there have been lengthy negotiations and complicated questions of title, do not afford a useful guide in a simple case of this sort where the plaintiff had actually got his deed ready, and the only difficulty arose from his not being ready and willing to pay the price. *Nott* v. *Riccard*[3] shows that, in considering the reasonableness of time, what has previously been done in the matter must be taken into account. "What constitutes reasonable notice and a reasonable time to be fixed on it must depend upon the contract and the circumstances of each case"—*Macbryde* v. *Weekes*[4]. The speed with which the defendant after the 11th September completed with the Chimkárs and set about the repairs, shows the urgency of the matter, in his opinion.

A great mass of evidence has been given in relation to the repairs and what was said by the plaintiff when they were begun, without, I think, much consideration being given to its bearing upon the points the Court had to decide. That the defendant at some expense repaired the premises, was not disputed. That he acted *bonâ fide* in doing so, I do not think was open to doubt, but

(1) 43. L. J. Ch., 449.
(2) 6 Hare, 222.
(3) 22 Beav., 307.
(4) 22 Beav., 533.

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what is the legal result? I have not been referred to any authority to show that a vendor executing repairs to property which he has contracted to sell ought to be recouped for such repairs by his vendee if they have not been done at the request of the latter, or that the latter is not entitled to specific performance except upon conditions of making payment for such repairs to his vendor. I know myself of no authority for either proposition; such authority may perhaps exist, I only say I do not know of it. There can be no question of estoppel in the matter; the facts of the case were equally well known to both parties; perhaps, if the balance were carefully looked to, they were better known to the defendant than to the plaintiff. It is not pretended that the plaintiff said anything when the repairs were begun which determined his legal right to specific performance of his contract if he then had any. The utmost attempted to be established was that, without referring to his contract, the plaintiff agreed to a line defining the boundary between the two properties. How could his doing so affect his legal right to enforce performance if he then had that right? On the other hand, if the plaintiff then insisted that his contract was enforceable, his then so insisting would not even tend to make it so. On the 6th of October he clearly did so insist. The evidence seems to me to be wholly irrelevant, and I regret that the parties should have been put to the expense of having it recorded.

I find on the issues as follows (His Lordship stated his findings), and dismiss the suit with costs.

The plaintiff appealed. The appeal was heard on July 13th, 1888, by Sargent, C. J., and Bayley, J., who confirmed the decree.

Attorneys for the plaintiff:—Messrs. *Craigie, Lynch and Owen.*
Attorneys for the defendant:—Messrs. *Tyabji and Dáyábhái.*

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KHUSHA'LCHAND MULCHAND AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NAGINDA'S MOTICHAND AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.* 1888. *January* 9.

Valuation of suit for purposes of jurisdiction—Suit for account and for balance that may be found due—Appeal—Act XIV of 1869, Secs. 8 and 26.

The plaintiffs sued for an account of all the business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest.

The plaintiffs valued the relief sought approximately at Rs. 510 and this was the only valuation stated in the plaint. The suit was filed in the Court of a First Class Subordinate Judge, who rejected the plaintiff's claim. Against this decision the plaintiffs preferred an appeal to the High Court.

Held, that as the approximate amount of the claim was stated in the plaint to be Rs. 510, that must be taken to be the value of the subject-matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under sections 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. Under section 50 of the Code of Civil Procedure (Act XIV of 1882) if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. As in the former instance the precise amount, so in the latter the approximate amount stated in the plaint must be taken to be the amount or value of the subject-matter of the suit for purposes of jurisdiction.

APPEAL from the decision of Ráv Bahádur Motilál Lálbhái, First Class Subordinate Judge of Ahmedabad, in Suit No. 22 of 1882.

The plaint stated that a firm for selling cloth was opened at Jalgaon, in the name of Jechand Rupchand, by the plaintiffs' father Khushál Mulchand and one Rupchand Dagdusa; that in 1857 Khushál became the sole owner of the firm, and continued the business in the name of Jechand Khushál; that the defendants acted as commission agents at Ahmedabad for purchasing goods for the firm from 1854 to 1867, on the understanding that they were to state in the invoices the price actually paid by them for the goods purchased for the plaintiffs' firm, and receive two *per cent.* commission on the same, giving credit for all deductions to

* Appeal, No. 24 of 1885.

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be received from the sellers of goods, according to the usage of trade, on account of *vatáv, mudat, &c.*; that notwithstanding this understanding the defendants had fraudulently given the plaintiffs credit for less than the deductions received from the sellers of goods, and charged them with more than the price paid for them; that this fraud came to their knowledge in 1879. The plaintiffs, therefore, prayed that an account should be taken of all the business done by the defendants as their commission agents from 1854 to 1867, and that whatever was found due should be awarded to them with interest at nine *per cent. per annum*.

The plaintiffs at first valued the relief sought at Rs. 130, but afterwards raised the valuation to Rs. 510, to prevent the suit from being treated as one cognizable by a Court of Small Causes.

The suit was filed in the Court of the First Class Subordinate Judge of Ahmedabad, who rejected the plaintiffs' claim with costs.

Against this decision the plaintiffs appealed to the High Court.

At the hearing a preliminary objection was taken to the jurisdiction of this Court to entertain the appeal.

Mánekshán Jehángirshán for the appellants:—This is a suit for account, and under the Court-fees' Act (VII of 1870) the plaintiff is at liberty to value his claim as he likes. But the valuation for purposes of court-fees does not determine the question of jurisdiction—*Manohar Ganesh* v. *Bawa Rámcharandás*[1].

In this case we estimate the probable value of our claim at Rs. 7,000. The appeal, therefore, lies to this Court.

Rán Sáheb *Vásudev Jagannáth Kirtikar*, for the respondents, was not called on.

BIRDWOOD, J.:—In this suit the plaintiffs prayed that accounts might be taken of all business done by the defendants on their behalf from 1854-55 to 1866-67, and that whatever was found due, might be decreed with interest.

(1) I. L. R., 2 Bom., 219

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The Subordinate Judge dismissed the suit, and the plaintiffs have appealed to this Court; and the question is whether this Court has jurisdiction to hear the appeal. The plaintiffs first valued the relief sought by them at Rs. 130. They afterwards raised this valuation to Rs. 510, to prevent the suit from being treated as one cognizable by a Court of Small Causes. Under Act VII of 1870, sec. 7, cl. iv (*f*), a plaintiff can, in a suit for accounts, value the relief he seeks at any amount he chooses; and he pays court-fees only on such amount: see *Govandas Kasandas* v. *Dáyábhái Savaichand*[1]. It is argued, however, that such a valuation is a valuation only for the purposes of court-fees and not a valuation for the purposes of jurisdiction. Of course, valuations for both these purposes are not necessrily identical (*Manohar Ganesh* v. *Bábu Rámcharandás*[2]); and where they differ, both valuations can be stated in the plaint. In the present case, however, the plaint contains but one valuation. Under section 50 of the Code of Civil Procedure (XIV of 1882), if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. We think that as in the former instance the precise amount, so in the latter the approximate amount stated in the plaint must be taken to be the amount or value of the subject-matter of the suit for purposes of jurisdiction. As in the present case, the approximate amount of the claim, as stated in the plaint, is Rs. 510, we must take that to be the value of the subject-matter of the suit; and the appeal lies, under sections 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. We, therefore, return the memorandum of appeal with its accompaniments to the appellant, in order that he may, if so advised, present it to a proper Court. We make no order as to costs.

Memorandum of appeal returned for presentation to the proper Court.

(1) I. L. R., 9 Bom., 22. (2) I. L. R., 2 Bom., 219.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1888. *January* 21. AGARCHAND GUMÁNCHAND, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAKHMA HANMANT AND ANOTHER, (ORIGINAL DEFENDANTS), (RESPONDENTS).*

Mortgage—Mortgaged land subsequently sold by mortgagee in execution of a money decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Limitation Act XV of 1877, *Sch. II, Art.* 138—*Landlord and tenant—Tenant denying landlord's title—Notice to quit—Decree—Execution—Civil Procedure Code (VIII of* 1859), *Sec.* 213.

Where a judgment-creditor in execution of a money-decree sells property, as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price This principle applies even though the mortgage-deed has been registered.

In 1867, Rakhma and Gajia mortgaged certain lands to Gangárám by a registered deed of that date. In 1870, Gangárám obtained a money-decree against Rakhma and Gajia, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February, 1872, obtained possession through the Court. In the meantime, Gangárám brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April, 1872, ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against Rakhma, Gajia, and Gangárám to recover the lands. He alleged that after he got possession in 1872 he had leased the property to Rakhma and Gajia.

They denied the letting by the plaintiff, and alleged that they were tenants of Gangárám.

Held, that the plaintiff was entitled to recover. Gangárám, (the mortgagee), when bringing the land to sale in execution of his decree was bound by section 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not, therefore, retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale.

* Second Appeal, No. of 679 of 1885

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Held, also, that as Rakhma and Gajia claimed only to be tenants of Gangárám, they could not retain possession of the land, merely because the plaintiff had failed to prove that he had let the land to them. They denied the plaintiff's title, and were not, therefore, entitled to any notice to quit.

Held, also, that the plaintiff's suit was not barred by article 138 of Schedule II of the Limitation Act XV of 1877, inasmuch as the plaintiff had obtained possession through the Court within the twelve years preceding the suit.

SECOND appeal from the decision of M. B. Baker, District Judge of Násik, in Appeal No. 135 of 1884.

On the 20th June, 1867, one Rakhma and his brother Gajia (defendants Nos. 1 and 2) mortgaged certain lands to Gangárám Motirám, (defendant No. 3), by a mortgage-deed of that date. The deed was registered.

On the 8th February, 1870, Gangárám, the mortgagee, put up the mortgaged lands for sale in execution of a money-decree which he had obtained against Rakhma and Gajia. The plaintiff Agarchand was the purchaser at the court-sale. He obtained possession through the Court on the 12th February, 1872.

In his application for execution of his money decree, Gangárám had fraudulently concealed the fact of his previous mortgage. Nor did he give any notice of his mortgage lien to the intending purchasers at the court-sale.

In 1871, Gangárám as mortgagee sued Rakhma and Gajia, (the mortgagors), for possession of the mortgaged lands, and having obtained a decree, dispossessed the plaintiff on the 23rd April, 1872.

In 1883 the present suit was filed by the plaintiff, as auction-purchaser, to recover back the lands of which he had been dispossessed. He alleged that in February, 1872, immediately after getting possession through the Court, he had let the lands to Rakhma and Gajia for cultivation for one year, that their tenancy expired in March, 1873, and that they refused to deliver up possession at the instigation of Gangárám.

The first and second defendants, Rakhma and Gajia, pleaded that they had never taken the land for cultivation from the plaintiff; that they were Gangárám's tenants for several years; and that the suit was barred by limitation.

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Gangárám, (defendant No. 3), pleaded that the lands had been mortgaged to him by Rakhma and Gajia for Rs. 200 under a mortgage bond dated the 20th June, 1867; that the mortgagors had been his tenants ever since the date of the mortgage; that in 1876 he had sued the mortgagors and obtained possession through the Court on the 23rd April, 1872; and that the plaintiff's claim was time-barred.

The Court of first instance found that the tenancy alleged by the plaintiff was not proved, and that his claim was time-barred. The suit was, therefore, dismissed.

On appeal the District Judge was of opinion that the suit was filed within time, limitation having begun to run against the plaintiff from the date of his dispossession by Gangárám in April, 1872, and not from the date of his purchase at the court-sale. The District Judge, however, held, on the authority of *Lakshmandás Sarupchand* v. *Dasrat*[1], that the registration of Gangárám's mortgage-deed was a sufficient notice to the plaintiff as auction-purchaser of the prior mortgage, and that, therefore, he must be taken to have bought only the equity of redemption. As the present suit was not one for redemption of the mortgage, the plaintiff's claim was rejected, and the lower Court's decree was confirmed with costs.

Against this decision the plaintiff appealed to the High Court.

Dáji Abáji Khare for the appellant:—Gangárám gave no notice of his mortgage-lien to the intending purchasers at the court-sale. He allowed them to bid for the property as though it were free from any incumbrance or charge in his own favour. He is, therefore, estopped from disputing the title of the plaintiff who purchased. The registration of his mortgage-deed does not avail him. Refers to *Tukárám* v. *Rámchandra*[2], *Dullub Sirkar* v. *Krishna Kumár*[3], and *Tinnáppá Chetti* v. *Murugáppá Chetti*[4].

G. M. Tripati for the respondent:—The plaintiff had constructive notice of the mortgage. The registration of the mortgage-

(1) I. L. R., 6 Bom., 168.
(2) I. L. R., 1 Bom., 314.
(3) 3 Beng. L. R., 407.
(4) I. L. R., 7 Mad., 107.

deed was a sufficient notice of our lien. We were not bound to give any further notice—*Lakshmandas Sarupchand* v. *Dasrat*[1]; *Rádhábái* v. *Shámráv Vináyak*[2]. The suit is barred by limitation. It is a suit by an auction-purchaser to recover possession of the property he has purchased. The judgment-debtor is in possession. Article 183 of Schedule II of the Limitation Act (XV of 1877) applies. Then symbolical possession, such as the plaintiff obtained from the Court, does not save limitation—*Shoteenáth Mookerji* v. *Obhoy Nund Roy*[3]; *Krishna Lall Dutt* v. *Rádha Krishna Surkhel*[4]; *Anand Coomári* v. *Ali Jámin*[5].

BIRDWOOD, J. :—The third defendant (Gangárám) held a money decree against Rakhma and Gajia, the first and second defendants, and also a mortgage on the land in suit. He brought the land to sale on his money decree, but in his application for attachment concealed the fact of his mortgage. The plaintiff was the purchaser, and he now sues to eject the first and second defendants, who, as he says, became his tenants for one year after he had obtained possession under his sale, but refused to vacate at the end of the year. The sale took place in 1870. The plaintiff was put in possession by the Court in February, 1872. The third defendant, however, displaced this possession in April, 1872, under a decree for possession obtained by him on his mortgage bond against the first and second defendants. The present suit was brought in 1883.

It has been argued that it is barred under article 138 of Schedule II of Act XV of 1877; but we cannot apply that article to the claim, for the plaintiff obtained possession from the Court within the twelve years preceding the suit. The lower appellate Court has held that the plaintiff cannot succeed, because he must be held to have had notice of the third defendant's mortgage when he purchased, as that mortgage was registered, and that he purchased, therefore, only the equity of redemption; and both the Courts below have held that the alleged lease to the first and second defendants is not proved. But the decisions in such cases as *Lakshmandás Sarupchand* v. *Dasrat*[6], in which it

(1) I. L. R., 6 Bom., 168.
(2) I. L. R., 8 Bom., 168.
(3) I. L. R., 5 Calc., 331.
(4) I. L. R., 10 Calc., 402.
(5) I. L. R., 11 Calc., 229.
(6) I. L. R., 6 Bom., 168.

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has been held that registration amounts to notice to all subsequent purchasers of the same property, clearly do not govern a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. There was nothing in the circumstances of the court-sale in the present case to put the plaintiff on enquiry as to the title of the apparent owners of the property. The third defendant, when bringing the property to sale, was bound by section 213[1] of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he induced the plaintiff to pay full value for the property, and he cannot now retain his lien. By his omission he is estopped from disputing the plaintiff's title. See *Tukárám* v. *Rámchandra* [2] and *Dullab Sirkar* v. *Krishna Kumár* [3].

As the first and second defendants claim to be only tenants of the third defendant, they cannot retain possession of the land, merely because the plaintiff has failed to prove the alleged letting. They deny the plaintiff's title, and are not entitled to any notice to quit. We, therefore, reverse the decrees of the Courts below, and award the claim with costs.

PARSONS, J.:—There can be no doubt on the authorities—*Dullab Sirkar* v. *Krishna Kumár* [4], *Tukárám* v. *Rámchandra* [5], *Tinnápá Chetti* v. *Murugáppá Chetti* [6] and *Hari* v. *Lakshman* [7] —that where a judgment-creditor sells property as that of his judgment-debtor he is estopped from setting up a previous mortgage which had been created in his own favour of which he has given no notice and in ignorance of which the purchaser has bid for the property and paid the full price It is argued

(1) "Section 213.—When the application is for an attachment of any land or other immoveable property belonging to the defendant, it shall be accompanied with an inventory or list of such property, containing such a description of the property as may be sufficient to identify it, together with a specification of the defendant's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same * * * .

(2) I. L. R., 1 Bom., 314.
(3) 3 Beng. L. R., 407.
(4) 3 Beng. L. R., 407.
(5) I. L. R., 1 Bom., 314.
(6) I. L. R., 7 Mad., 107.
(7) I. L. R., 5 Bom., 614.

that in the present case the mortgage-deed being registered, the purchaser had notice thereof—*Lakshmandás Sarupchand* v. *Dasrat*[1]. That case, however, appears to have no bearing upon this case, for here the person who caused the property to be sold was the judgment-creditor himself. He was by section 213 of the Civil Procedure Code (VIII of 1859) bound to specify the judgment-debtor's interest in the property to the best of his belief. If he fraudulently conceals the fact of his mortgage, and specifies the judgment-debtor's interest to be that of an unincumbered ownership of the property, and if relying on that specification the purchaser gives what may fairly be considered to be the full value of the property, the judgment-creditor is clearly estopped from afterwards setting up his mortgage. He cannot reap the benefit of his fraud and obtain the full value of the property twice over.

It is further argued that the plaintiff's suit is time-barred. As, however, the plaintiff was placed in possession after his purchase, and has been in possession within twelve years of suit, and as the defendant No. 3's possession admittedly commenced only in April, 1872, and the suit is brought within twelve years from that time, the suit is within time. The decree that the defendant No. 3 obtained against his mortgagors after he had caused their interest to be sold, was fraudulent and is null and void as against plaintiff. I concur in reversing the decrees of the lower Courts and awarding the plaintiff's claim, with costs throughout.

Decree reversed.

(1) I. L. R., 6 Bom., 168.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1888. *January* 24.

MUKTA'JI BHA'GOJI AND ANOTHER, (ORIGINAL DEFENDANTS), APPLICANTS, *v.* MA'NA'JI, (ORIGINAL PLAINTIFF), OPPONENT.*

Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 53 and 54—Special Judge —His powers in revision— Withdrawal of suit—Mistake in filing suit not a ground for withdrawal.

A Special Judge appointed under section 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not competent, in the exercise of his revisional powers, to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff filed a suit for redemption under the provisions of Chapter III of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge dismissed the suit, on the ground that the plaintiff had failed to prove both the fact of the mortgage and his ownership of the land in dispute.

The plaintiff thereupon applied to the Special Judge for revision of the Subordinate Judge's decision. While this application was pending, the plaintiff made another application to the Special Judge to allow him to withdraw the suit with liberty to bring a new one, on the ground that "he had committed some error in bringing the suit, and that it was now too late for him to amend the plaint." The Special Judge allowed him to withdraw the suit.

The defendants thereupon applied to the High Court under its extraordinary jurisdiction to set aside the order of the Special Judge as being *ultra vires*.

A rule *nisi* having been granted,

Nagindás Tulsidás, for the plaintiff, showed cause:—The proceedings before the Special Judge are a continuation of the original suit. Under section 74 of Act XVII of 1879 the provisions of the Code of Civil Procedure (Act XIV of 1882) apply to all suits and proceedings instituted under the Act. The Special Judge has, therefore, power to allow the withdrawal of a suit under section 373 of the Civil Procedure Code. In

*Application under Extraordinary Jurisdiction, No. 118 of 1887.

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MUKTÁJI BHÁGOJI v. MÁNÁJI.

Gunga Rám v. *Data Rám*[1] it is held that the High Court can allow a suit to be withdrawn even in second appeal. The principle of this decision applies to the present case.

Ganesh Rámchandra Kirloskar, contra:—Section 53 of Act XVII of 1879 does not authorize the Special Judge to allow a suit to be withdrawn after decree. The decree in the present case is not alleged to be illegal or wrong. And except on the ground of illegality or material irregularity, the Special Judge cannot, as a Court of Revision, reverse or modify the decision of a Subordinate Court.

BIRDWOOD, J.:—When the Special Judge appointed under section 54 of Act XVII of 1879 calls for and examines the record of a suit under section 53, he can legally do so only for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under Chapter II, IV or VI of the Act and as to the regularity of the proceedings therein. In the present case the Subordinate Judge had rejected a suit for redemption, on the ground that the plaintiff had failed to prove the mortgage and was not the owner of the land in suit. Thereupon the plaintiff applied to the Special Judge to review the decree under section 53 of the Act. While the application was pending, the plaintiff made another application, saying that he had "committed some error in the matter of bringing the suit," and asking for permission to withdraw the suit, with liberty to bring a new one, as it was then too late to amend the plaint. The Special Judge granted this application. In doing so, we think, he acted without jurisdiction; for the plaintiff did not, in his second application, complain of any illegality or impropriety in the decree of the Subordinate Judge. He did not say that the Subordinate Judge had wrongly refused to allow him to withdraw the suit. He alleged merely a mistake on his own part in bringing the suit. This was not a ground which justified the interference of the Special Judge. We, therefore, make absolute, with costs, the rule *nisi* granted in this case; and, reversing the Special Judge's order, restore the decree of the Subordinate Judge

Rule made absolute.

(1) I. L. R., 8 All., 82.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1888. *February* 14.

MANISHANKAR PRA'NJIVAN, (ORIGINAL PLAINTIFF), APPELLANT, v. BAT MULI AND ANOTHER, (DEFENDANTS), RESPONDENTS.*

Minor—Act XX of 1864, *Sec.* 18—*Sanction of alienation of minor's property—Civil Procedure Code (Act X of* 1877), *Sec.* 462—*Compromise on behalf of a minor —Mortgage—Assignment of mortgage by guardian of minor—Suit on mortgage by assignee—Proof of assignment when necessary—Consideration for assignment—Adequacy of consideration.*

Section 18 of the Minors' Act XX of 1864 applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow, acting as natural guardian of her minor son, but who has not obtained a certificate under the Act (XX of 1864), is not invalid because effected without the sanction of the Court.

Where a widow acting as natural guardian of her minor son assigned a mortgage which had been executed to her deceased husband for a consideration, a part of which was a sum due under a decree to the assignee,

Held, that such an assignment was not invalid under section 462 of the Civil Procedure Code (Act X of 1877). Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable would only affect the consideration for the assignment by reducing its amount.

The plaintiff sued, as assignee of a mortgage, to recover the debt due from the mortgagors personally and from the property mortgaged. The assignor was a Hindu widow, acting as natural guardian of her minor son. The consideration for the assignment was a sum of Rs. 68-9-0 due to the plaintiff under a decree obtained by him and Rs. 30-7-0 cash paid.

The lower Courts held that as to the Rs. 68-9-0 the transaction really amounted to a satisfaction or adjustment of the decree under which it was due, and that as such adjustment had not been certified to the Court it was invalid; they further held that the consideration for the assignment of the mortgage having so far failed, the assignment was without adequate consideration, and, therefore, they dismissed the suit. On appeal to the High Court,

Held, that although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that under the peculiar circumstances of this case that rule did not apply. The mortgage-deed was assigned by a widow acting as the natural guardian of a minor, and a great part of the consideration for the assignment had admittedly failed, the confirmation of the decree which formed part of the consideration not having been certified to the Court. There was on the record no admission of the assignment by the assignor. It might be that the

* Second Appeal, No. 755 of 1885

minor in a suit by his next friend or guardian appointed under Act XX of 1864 might dispute the assignment. The defendants in order to protect themselves had a right to call on the plaintiff to prove the assignment, and a Court ought in the interests of justice to see that they were so protected. The assignment was on behalf of a minor, and the person acting as his guardian had not admitted it, and it might be that even her admission would not be binding on him since he was not a party to the suit. It was necessary that the point should be so tried and determined as to bind the minor, and to do that it was essential that he should be made a party to the suit.

The Court, therefore, reversed the decree of the lower Courts and remanded the case.

SECOND appeal from the decision of S. Hammick, Acting District Judge of Surat, in Appeal No. 54 of 1884.

The plaintiff as assignee of a mortgage sued the defendants, (the mortgagors), to recover Rs. 250 due upon the mortgage. The mortgage was originally executed on the 23rd December, 1871, by the defendants, (Bái Muli and another), to one Magan Jiva. After the death of Magan Jiva (the mortgagee) his widow acting as the natural guardian of her minor son assigned the mortgage to the plaintiff, the consideration for the assignment being a sum of Rs. 68-9-0 due to the plaintiff under a decree obtained by him and Rs. 30-7-0 paid in cash by the plaintiff to her. The assignment was made on the 7th September, 1880.

The defendants (the mortgagors) contended *(inter alia)* that they knew nothing of the assignment of the mortgage, that it was not a *bond-fide* transaction, and that the debt due under the mortgage bond had been paid off ten years previously.

The Subordinate Judge was of opinion that, as far as Rs. 68-9-0 was concerned, the assignment was really a satisfaction or adjustment of the decree out of Court, and that as it had never been certified to the Court, it was null and void. He, therefore, held that the assignment of the mortgage was without consideration, and on that account void under section 23 of the Indian Contract Act (IX of 1872). The suit was, therefore, dismissed.

On appeal this decision was confirmed by the Acting District Judge, for the following reasons:—

"The pleader for the plaintiff (appellant) has attempted to controvert this view" (*i.e.* the Subordinate Judge's), "and sup-

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MANISHAN-KAR PRÁNJIVAN v. BAI MULI.

ports his argument by the authority of the Allahabad High Court case—*Rámghulám* v. *Jánki Bái*[1]. That case was very similar to the present one, and undoubtedly the view taken by the High Court is in favour of the appellant. The Bombay High Court, however, in the case of *Pátankar* v. *Dovji*[2], took the opposite view, and held that a suit for the recovery of money paid to a judgment-creditor out of the Court and not certified appears to be barred by section 244 of Act X of 1877, and by the last paragraph of section 258 as amended by Act XII of 1879. The same law governs the present case, and the Bombay High Court has adhered to its previous enunciation of the law in the more recent case of *Pándurang Rámchandra Chowghule* v. *Náráyen*[3]. For this Presidency, therefore, the law seems for the present to be settled, and I am bound to hold that as more than two-thirds of the ostensible consideration for the purchase of plaintiff's mortgage-deed was valueless, the sale of the mortgage-deed was without adequate consideration, and the transaction is, therefore, void. The plaintiff, therefore, is barred from suing on his mortgage-deed, and his claim must be rejected.

"A second objection to the plaintiff's suit has been found in the fact that the mortgage-deed, which deals with immoveable property belonging to a minor, was sold to him by Bái Kunvar, the minor's natural guardian, without the sanction of the Civil Court. This objection also appears to be supported by the authority of the High Court's decision in *Bái Kesar* v. *Bái Ganga*[4]. The provisions of section 462 of Act X of 1877 interpose a further bar of an analogous nature to the plaintiff's suit.

"On the above grounds I find that the plaintiff's (appellant's) suit is barred, and I, therefore, confirm the decree of the lower Court and reject this appeal with costs."

Against this decision the plaintiff appealed to the High Court.

Motilál M. Munshi for the appellant:—Here, as in England, a mortgagee may transfer his rights to a third person by way of

(1) I. L. R., 7 All., 124.
(2) I. L. R., 6 Bom., 146.
(3) I. L. R., 8 Bom., 300.
(4) 8 Bom. H. C. Rep., 31, A. C. J.

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assignment—*Chinnayya Rawutan* v. *Chidambaram Chetti*[1]; *Gokuldás Jagmohandás* v. *Lakhmidás Khimji*[2]; *Abdool Hakim* v. *Doorga Prashad Bonerji*[3].

Mánekshá Jehángirshá for the respondent:—The assignment in question is opposed to public policy. It is, therefore, invalid under section 23 of the Indian Contract (IX of 1872). The greater part of the consideration consists of a judgment-debt which has been compromised. This compromise was not certified to the Court. The consideration is, therefore, illegal.

BIRDWOOD, J.:—In this case the plaintiff sued, as the assignee of a deed of mortgage, to recover the debt from the defendants, the mortgagors, and the mortgaged property. The assignor was a widow, acting as the natural guardian of her minor son.

The District Judge has held the assignment invalid, for three reasons:—(1) because the assignment had not been sanctioned by the District Court under section 18 of the Minors' Act XX of 1864[4]; (2) because the leave of the Court was not obtained under section 462[5] of Act X of 1877 to the compromise by which the decree was satisfied; and (3) because the sale of the mortgage-deed was without adequate consideration. The first reason is bad, because the widow was a *de facto* manager under the Hindu law who had not applied for any certificate under the Minors' Act, and section 18 of the Act applies only to persons to whom a certificate has been granted under the Act. See *Bái Amrit*

(1) I. L. R., 2 Mad., 212. (2) I. L. R., 3 Bom., 402.
(3) I. L. R., 5 Calc., 4.

(4) "Section 18.—Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor. But no such person shall have power to sell, alienate, mortgage, or otherwise encumber any immoveable property, or to grant a lease thereof for any period exceeding five years without the sanction of the Civil Court previously obtained."

(5) "Section 462.—No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

"Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor."

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v. *Bái Mánik*[1] and *Rám Chundar Chuckerbutty* v. *Brojonáth Mozumdár*[2]. The second reason is also bad, because, even assuming that section 462 of the Code of Civil Procedure applies to the compromise of a decree, the circumstance that the compromise was voidable would affect only the consideration for the assignment of the mortgage by reducing its amount.

As to the third reason, it is argued that such an objection ought not to have been taken, inasmuch as the transaction was proved. In ordinary cases, no doubt, it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration. See *Kachu Bayaji* v. *Kachobá Vithobá*[3] and *Tukárám* v. *Bahiráv Yádavrav Keskar*[4]. In this case, however, the circumstances are peculiar. There is on the record no admission of the assignment by the assignor. The mortgage-deed, moreover, is assigned by a widow, acting as the natural guardian of a minor, and a great part of the consideration has admittedly failed, the compromise of the decree which formed a part of the consideration not having been certified to the Court. It might be that the minor in a suit by his next friend or by a guardian appointed under Act XX of 1864 might dispute the assignment. The defendants, in order to protect themselves, have the right to call on the plaintiff to prove the assignment, and a Court ought, in the interests of justice, to see that they are so protected. When the assignor is an adult, that can of course be done by his own admission recorded in the suit. Here, however, the assignment is on behalf of a minor, and the person, acting as his guardian, has not admitted it, and it might be that even her admission would not be binding on him, since he is not a party to the suit. It is necessary, therefore, that the point shall be so tried and determined as to bind the minor, and to do this it is essential that he be made a party to the suit.

We, therefore, reverse the decrees of the lower Courts and remand the case for the minor represented by a guardian for the suit to be joined as a defendant and for the point as to the legal-

(1) 12 Bom. H. C. Rep., 79, A C J.
(2) I. L. R., 4 Calc., 920.
(3) 10 Bom. H. C. Rep., 491.
(4) Printed Judgments for 1888, p. 7.

ity of the assignment to be determined as between him and the plaintiff, and thereafter for the determination of the suit on the merits as between the plaintiff and the present defendant. Costs to be provided for in the new decree.

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Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

KA'GAL GANPAYA, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MANJA'PP'A AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1888. *August* 14.

Hindu law—Joint family—Money decree—Decree against father alone—Purchaser at execution sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution proceedings.

In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree.

In the case of an execution sale the mere fact that the decree was a mere money decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold, is not a complete test.

The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person, who had purchased it at an auction sale held in execution of a money decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale; and the lower Courts decided in their favour.

In appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money decree without referring to the execution proceedings.

THIS was a second appeal from a decision of G. McCorkell, District Judge of Kánara.

The plaintiff sued the defendant for certain property, alleging that he had purchased it from a person who himself had bought it

* Second Appeal, No. 440 of 1886.

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at an auction sale held in execution of a money decree obtained against the first defendant Manjáppá.

The other five defendants, who were Manjáppá's sons, contended that by the sale, in execution of the decree against their father alone, their interest was not affected, the property being family property.

The Court of first instance awarded the plaintiff one-sixth of the property.

The plaintiff appealed to the District Judge, who confirmed the lower Court's decree having regard to the cases cited in the following paragraph of his judgment:—

"The appellant's pleader relies on the case of *Girdhávee Lall* v. *Kantoo Lall*(1), *Rám Náráin Lal* v. *Bhawani Prasad*(2), *Ponnappa Pillai* v. *Pappuvayyangar*(3), *Sivasankara Mudali* v. *Parvati Anni*(4), *Gan Savant Bál Sávant* v. *Náráyan Dhond Sávant*(5), and *Trimbak Bálkrishna* v. *Náráyan Dámodar Dábholkar*(6).

"Respondent relies on the ruling in *Bábáji* v. *Dhuri*(7).

"As the decree was on account of unsecured debt, the case cited by the respondent must prevail. It would have been otherwise had the debt been a mortgage-debt.

"For this reason I hold that only the father's share could be sold in execution of the decree, and the shares of the sons cannot be touched."

The plaintiff preferred a second appeal to the High Court.

Náráyan Ganesh Chandávarkar for the appellant:—The lower Courts were wrong in holding that the father's interest alone passed. The only test is to see what the purchaser had bargained for and paid for: see *Mussamut Nanomi Babuasin* v. *Modhun Mohun*(8) followed by this Court in *Jagábhái Lalubhái* v. *Vijbhukandas Jagjivandás*(9) and *Sakhárámshet* v. *Sitárámshet*(10).

(1) 1 Ind. Ap., 321.
(2) I. L. R., 3 All., 443.
(3) I. L. R., 4 Mad., 1.
(4) I. L. R., 4 Mad., 96.
(5) I. L. R., 7 Bom., 467.
(6) I. L. R., 8 Bom., 491.
(7) I. L. R., 9 Bom., 305.
(8) 13 Ind. Ap., 1 S. C.; I. L. R., 13 Calc., 21.
(9) I. L. R., 11 Bom., 37.
(10) I. L. R., 11 Bom., 42.

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Ghanashám Nilkanth Nádkárni, for the respondents, contended, on the authority of *Báboo Hurdey Nárain Sahu* v. *Pundit Báboo Rooder Perkash Misser*(1), *Girdháree Lall* v. *Kantoo Lall*(2) and *Trimbak* v. *Náráyan*(3), that where there is a mere money decree, the father's interest alone passes. The sons were not parties to the suit, and their interest stood unaffected.

SARGENT, C. J :—The District Judge held that only the share of Manjáppá, the second defendant, passed to the plaintiff's vendor under the Court sale in execution of the decree against the second defendant, on the ground that the decree was a mere money decree as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold. This distinction is doubtless much relied on by the Privy Council in *Báboo Hurdey Nárain Sahu* v. *Pundit Báboo Rooder Perkash Misser*(4) as explaining the apparent inconsistency between the decision in *Girdháree Lall* v. *Kantoo Lall*(5) and that in *Deendyal Lal* v *Jugdeep Nárain Singh*(6); and was acted upon by this Court in *Trimbak* v. *Náráyan*(7). However, that the above distinction is not a complete test of whether the entire family property or only the father's interest in it passes to the auction-purchaser, and that *Deendyal's Case* does not bind the Court to hold under all circumstances that only the co-parcenery interest of the father passes to the purchaser, is shown by the decision in *Mussamut Nanomi* v. *Modun Mohun*(8), where the decree was a mere money decree, and yet the Privy Council, confirming the decision of the Calcutta High Court, held that the entire family interest in the property passed to the purchaser, on the ground that the language of the execution and sale proceedings was such that the purchaser must be deemed "to have bargained and paid for the entirety."

In *Simbhunáth Pánday* v. *Goláb Singh*(9) the Privy Council after referring to *Deendyal's Case* and *Nanomi's Case* say: "Each

(1) 11 Ind. Ap., 26.
(2) 1 Ind. Ap., 321.
(3) I. L. R., 8 Bom., 481.
(4) 11 Ind. Ap., 26.
(5) 1 Ind. Ap., 321.
(6) 4 Ind. Ap., 247.
(7) I. L. R., 8 Bom., 481.
(8) 13 I. A., 1; S. C. I. L. R., 13 Calc., 21.
(9) 14 I. A., 77 at p. 83; S. C. I. L. R., 14 Calc., 572 at p. 579.

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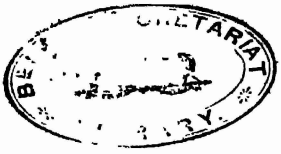
case must depend on its own circumstances. It appears to their Lordships that in all the cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money decree." In that case, as in *Deendyal's Case* and the case of *Hurdey Náráin*, the Court had little difficulty in coming to the conclusion that only the father's interest was intended to be sold by the proclamation, as the property attached and offered for sale stated by the certificate to have been purchased was, in terms, confined to the interest of the father in the family property.

As the District Judge has decided this question exclusively on the ground that the property was purchased in execution of a money decree without referring to the execution proceedings, we cannot accept his decision as conclusive. Those proceedings are not before us, and as the *vakils* on both sides think it the advisable course, we reverse the decree and send back the case for a fresh decision. Costs to abide the result.

Decree reversed.



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ACTS :—

1860—XXVII—*Certificate under Act XXVII of* 1860—*Regulation VIII of* 1827, *Sec.* 9—*Jurisdiction to grant certificate of administration—Foreigners residing abroad.*] Under section 3 of Act XXVII of 1860 a certificate can be granted only for the estate of a British subject either resident within the district where the certificate is sought, or else having no fixed place of residence. The Act does not make provision for administration of the effects of a foreigner domiciled abroad.

While Act XXVII of 1860 has regard to the person, Regulation VIII of 1827, on the other hand, looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration. The intention of section 9 seems to be that when there are assets within a *zilla*, and the circumstances exist which are specified in the section, a certificate of administration may be granted. The authority given under section 9 must be understood to be the same as under section 7.

B., a *sardár* of Baroda residing within the Gáikwár's territory, died there, leaving considerable property in the district of Surat. On his death, Mr. Lely, the Assistant Collector of Surat, was appointed administrator of B.'s estate, under section 9 of Regulation VIII of 1827. Shortly after his appointment as administrator, Mr. Lely went to England on furlough. During his absence, the plaintiffs sued, as heirs of B, to recover the balance of principal and interest due on a bond executed by the defendants in favour of B.

Held, that the plaintiffs were incompetent to sue. Mr. Lely having been appointed administrator of B.'s estate, and never having been relieved of his office as administrator by the Court, as contemplated by section 9 of Regulation VIII of 1827, his *status* still subsisted, and while it subsisted, no one else could represent the estate. The appointment of an administrator excludes other representatives so long as it endures.

MIR IBRÁHIM ALIKHÁN *v.* ZÍÁULNISSA LÁDLI BEGAM SÁHEB ... 150

1866—XXXVIII, SEC. 43—*Trustees' and Mortgagees' Powers Act XXVIII of* 1866, *Sec.* 43, *powers of Court under.*] J. S., a Hindu, died in 1865 possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J. S., still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs. 900 *per annum*, was insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity,

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and that she had agreed, in September 1887, with one Ratanji Bhikáji that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 *per mensem*. In October, 1887, however her adopted son served her with a notice to desist from granting the said lease. She, therefore, presented this petition to the Court under section 43 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, praying (*a*) that she might be advised whether she had power to grant the said proposed lease ; (*b*) that the said lease might be sanctioned or directed by the Court ; and (*c*) that the Court might give such opinion, advice or direction in the premises as the Court might think fit.

Held, that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, &c.

Held, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance ; but with regard to the details of amount, or as to the work to be done, the Court refused to give any opinion.

IN *RE* LAKSHMIDÁI 638

ACTS :—

1869—XIV, SECS. 8 AND 26.

See VALUATION OF SUIT FOR PURPOSES OF JURISDICTION... 675

1874—III (BOMBAY)—*Jurisdiction—Vatandár kulkarni and rayat—Perquisites, right to.*] Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a *vatandár kulkarni* is entitled to receive perquisites from his *rayat*.

VISHNU HARI KULKARNI *v.* GANU TRIMBAK 278

——— ——————— SEC. 40—*Civil Court's jurisdiction over suits in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary Offices' Act (III of* 1874), *Sec.* 40—*Election of an officiator—Free election—Agreement in restraint of free election—Act X of* 1876, *Sec.* 4—*Its application to suits between private persons.*] The plaintiff and his co-sharers in a *kulkarni vatan* entered into an agreement in 1869 for the performance of the duties of the *vatan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869.

Held, that the agreement could not be enforced by a civil suit, as it was opposed to the policy of section 40 of Bombay Act III of 1874, which contemplates a free election of an officiator by the whole body of registered representative *vatandárs* to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers.

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Held, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of clause (*a*) of section 4 of Act X of 1876. Having regard to the wording of the several clauses of section 4, the bar therein provided is not limited to suits against Government.

NÁRO PÁNDURANG *v.* MAHÁDEV PURSHOTAM 614

ADMINISTRATION—*Will—Letters of administration—Citation—Defective citation—Revocation of letters of administration—Probate, nature and effect of—Act V of* 1881, *Secs.* 16 *and* 50.] S., a Pársi, died, leaving a will, whereby he directed that after his death his estate should be managed by his widow Jivibái, and after her death by his sister-in-law Hirábái, and after Hirábái's death by the appellant, his adopted son Hormusji. On Jivibái's death, the testator's brother Dosábhái applied for letters of administration, and issued a citation to the appellant Hormusji. Hirábái entered a caveat. No further proceedings were taken, and the matter remained pending. On Hirábái's death, Dosábhái applied for a fresh citation to the appellant Hormusji, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to Dosábhái The appellant Hormusji subsequently applied for probate of the testator's will. The respondents filed caveats, alleging that the will was void, on the ground of certain bequests contained in it. They further contended that as the appellant had been cited to appear when application was made by Dosábhái for letters of administration, he could not now apply to have letters of administration cancelled.

Held, that the letters of administration granted to Dosábhái should be revoked, and that probate should be granted to the appellant. The only citation which had been issued to the appellant was in 1882, when Dosábhái commenced his proceedings to obtain letters of administration. At that time Hirábai, who was the executrix named in the will (the appellant Hormusji being only named as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship. On Hirábái's death, however, which took place before the actual grant of administration was made to Dosábhái, such a citation was necessary, under section 16 of Act V of 1881, before the grant could be legally made. In default of such a citation the proceedings were defective in substance—a circumstance which constituted good cause for the revocation of the letters of administration, under section 50 of Act V of 1881.

Held, also, that the District Judge was wrong in refusing probate of the will, on the ground that the bequests contained in it were illegal and void. Probate is only conclusive as to the appointment of executors and the validity and contents of the will; and in an application for probate, it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition

HORMUSJI NAVROJI *v.* BÁI DHANBÁIJI JAMSETJI DOSÁBHÁI ... 164

ADOPTION—*Adoption by an unmarried man—Hindu law.*] Adoption by an unmarried man is not invalid.

GOPÁL ANANT *v.* NÁRÁYAN GANESH 329

———*Hindu law—Adoption directed by will—Bequest of property by will to the boy named for adoption by testator—Adoption a condition precedent to such boy taking under the will—Conditional gift on*

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adoption—Conditions proposed by natural father before consenting to give his son in adoption—Adopting widow not obliged to consent to such conditions.] G. T., a Hindu of the Bhátiá caste, died on the 6th September, 1867, having by his will, dated the same day, directed that, in case no son was born to him, his widow S., (the plaintiff), should adopt the son of his nephew, who was to be "made his adopted son." The following was the material part of the will :—

"15. During my lifetime, or subsequently to my decease, should a child (begotten) by me not be born of the womb of my wife Shamávahoo, then I direct and order and appoint as follows :—There is my nephew Bhái Dwárkádás Vasanji. He has now one son to whom he has not as yet given a name. My wife Shámávahoo is to take that son in adoption after my decease, and he is to be made my adopted son. And after what is mentioned in (this) my testamentary writing has been done accordingly, I give (him), as an inheritance, all the residue of my property left at the time, and I appoint him as my heir. This lad is to perpetuate (my) own name as (if he were) the son of my loins, and (he) is to pay as much respect to my wife Shámávahoo as (if she were) his own mother ; and agreeably to her directions he is to act righteously. And my wife is to have this lad married, as (though he were her) own son, and upon his marriage, Rs. 20,000 are to be expended out of my property. And during the lifetime of my wife, should this lad die without coming of age, then my wife is duly to take in adoption such other (or second) son of Bhái Dwárkádás as may be (living) at the time, and he is duly to be treated as my son. (All) are duly to act towards him in all respects agreeably to what is written above, and he is to obey my wife Shámávahoo. If by the will of Providence it should so happen that there may be no other son of Bhái Dwárkádás, then I appoint my nephew Dwárkádás Vasanji as the heir of my property. And to him I give as an inheritance all the residue of my property left at the time. (It is given) in the following manner."

In 1870 this suit was filed by the plaintiff, (the widow and executrix of testator), for the purpose of having the will construed. The plaintiff *(inter alia)* complained that the defendant Dwárkádás Vasanji had refused to give his infant son in adoption to the plaintiff, and had named him Sundardás Dwárkádás, and had no other son. In his written statement, filed in 1871, the defendant Dwárkádás Vasanji denied that he had refused to give his said son in adoption. In a subsequent written statement filed on the 4th March, 1872, he informed the Court that a second son (Náronji) had since been born to him, and he submitted to the Court what were the rights and interests of such sons under the will. A decree was made in the suit in March, 1872. In January, 1878, the plaintiff presented a petition to the Court, stating that Sundardás having been born on the 29th April, 1867, was of the age of ten years and 9 months ; that, according to the custom of the testator's caste, the period during which he could be adopted would terminate on his attaining the age of eleven years, *viz.* in April, 1878 ; that she was ready and willing to adopt him, and had offered to do so, but that his father, (the first defendant), had refused to give him in adoption. She prayed *(inter alia)* that it might be declared that, in the event of the first defendant failing to give the said Sundardás in adoption, the first defendant and his two sons took no benefit under the said will.

The first defendant filed a counter petition in which he stated that he was always willing to give his son Sundardás to be adopted by the plaintiff on certain conditions, but that she had refused to

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consent to them, or to anything which would in the least interfere with her authority as a mother over the boy when adopted. He stated that the plaintiff was an adherent of a sect which held certain pernicious and immoral doctrines, to which he was much opposed, and which had been abhorred by the testator; and that, unless certain conditions, which he suggested, were imposed upon the plaintiff, the moral character of his son, if adopted, would be in danger of fatal injury.

Held, that the infant sons of the first defendant took nothing under the will, unless adopted.

Held, also, that the plaintiff was under no obligation to take the infant Sundardás in adoption on the conditions proposed by the first defendant, his natural father.

SHÁMÁVAHOO *v.* DWÁRKÁDÁS VASANJI... 202

ADOPTION—*Hindu law—Adoption during wife's pregnancy—Posthumous son, rights of, in family property—Will limiting legal share of such son.*] The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him, does not invalidate the adoption.

A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law, than with the right of a son *in esse* at the time of his death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born.

R. died, leaving him surviving his widow, who was then pregnant, and the defendant whom he had adopted a few days before his death. By his will, R. directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after R.'s death a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid, having taken place during the pregnancy of the plaintiff's mother, and that R.'s will, in so far as it was in prejudice of the plaintiff's rights as a son, was also invalid.

Held, that the adoption of the defendant by R. was valid, notwithstanding that R.'s wife was pregnant at the time of the adoption.

Held, also, that R.'s will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son, taking the other three-fourths.

HANMANT RÁMCHANDRA *v.* BHIMÁCHÁRYA 105

———*Hindu law—Will—Adoption directed to be made, not by testator's widow, but by the widow of his deceased son—Such adoption is an adoption, not to testator himself, but to his deceased son—Adoption of testator's nephew directed by will—Bequest of property to*

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such nephew—Adoption a condition precedent to his taking the property under the will—Persona designata—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.] K., a Hindu, by his will dated the day before his death, declared that it was his wish to adopt his nephew Karamsi as his son, but that, if he should be unable to do so in his lifetime, his daughter-in-law Ládkávahu, (the widow of his deceased son Liládhar), was "to take the said Karamsi in adoption." This will then continued: "His adoption ceremony is to be performed. My property, which may remain as a residue after all the things mentioned in my will have been done, I give to this lad as his inheritance, and I appoint him as my heir." A subsequent clause of the will directed as follows:—

46. "In the twenty-eighth clause above it has been directed (that a son) should be adopted. In accordance therewith, after the said Karamsi shall have been adopted, should he die without (leaving) any descendants, then *Choru* Ládkávahu is duly to adopt out of my father Jádu Asar's descendants, any lad who may be found fit. And if the said Ládkávahu should not be living at that time, then (any) lad (begotten) of the loins of my father Jádu Asar who may appear to my executors to be fit, is duly to be appointed my heir. And to him my property, as mentioned above, is duly to be given in inheritance. And his adoption ceremony is to be performed. And the outlays on the occasion of his marriage also are duly to be made as written above."

Held, that the direction by the testator to his daughter-in-law to adopt a son was a direction to her to adopt a son to herself and her deceased husband Liládhar, and not to adopt a son to the testator; the former being the only adoption which she was by Hindu law competent to perform.

Held, also, that, unless Karamsi was adopted as directed by the will, he was not entitled to the testator's property. His adoption was a condition precedent to his inheritance.

The will also contained the following devise in favour of the testator's grand-daughter Kesarbái, who was unmarried at the date of K.'s death:—

27. "When Kesarbái may marry, there is to be given to her out of my immoveable property one house which has been purchased from Sháh Virji Narsi's widow Lilábái. * * * That (house) is to be given to *Choru* Kesarbái as *kanyádán*. The rent which it may yield, Kesarbái may enjoy after (she) my grand-daughter shall have married. And after Kesarbái's decease (the ownership of) the said house shall duly be enjoyed by Kesarbái's children. If by the will of God Kesarbái should die without (leaving) descendants, then my 'Trustees' are duly to take back the said house into their possession."

Held, that, under the above clause, Kesarbái was entitled only to a life estate in the house.

KARSANDÁS NÁTHÁ *v.* LÁDKÁVAHU 185

AGENT—*Recognized agent—Civil Procedure Code (Act XIV of* 1882), *Sec.* 37—*Agent's right to execute decree obtained by him as agent—Waiver—Execution of decree.*

See PRINCIPAL AND AGENT 68

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AGREEMENT TO LEND MONEY—*Damages—Damages recoverable by lender for breach of such agreement—Contract Act IX of* 1872, *Secs.* 73 *and* 74.
See DAMAGES 242

ANCESTRAL PROPERTY—*Hindu law—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act (XV of* 1877), *Sec.* 14—*Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.*
See HINDU LAW 625

———————*Khoja Mahomedans, law applicable to—Partition—Right of a son to obtain partition of ancestral property in his father's lifetime without his father's consent—Distinction between ancestral and self-acquired property among Khoja Mahomedans—Custom, proof of—Practice—Evidence—Burden of proof.*
See PARTITION 280

———————*Property derived by a son from his mother when it originally formed part of his father's estate—Hindu law—Evidence.*
See HINDU LAW 122

ANNUITY—*Decree for payment of an annuity without specifying date of payment—Decree—Execution—Maintenance—Default in paying such annuity—Enforcement of payment by execution of decree—Limitation—Computation of time.*
See DECREE 65

BHA'GDA'RI ACT (BOM.) V OF 1862—*Civil Procedure Code (Act XIV of* 1882), *Sec.* 266 (c)—*Building site—Agriculturist bhágdár—Decree—Execution against bhág.*] A., having obtained a decree against B., who was a *bhágdár*, attached his *bhág* in execution, including the *gabhán* or site upon which B.'s house was built. B. applied to have the attachment removed from the *gabhán*, on the ground that he was an agriculturist, and that, therefore, the *gabhán* of his house was protected from attachment by clause (*c*) of section 266 of the Civil Procedure Code (Act XIV of 1882).

Held, that the *gabhán* was subject to attachment, and was not protected by the above clause. B. did not hold as an agriculturist. He could not have occupied the house, except as a *bhágdár*, and it was as part of a *bhág* that the site was attached. The protection of section 266, clause (*c*), was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.
JIVAN BHÁGÁ *v.* HIRÁ BHÁIJI 363

CASTE QUESTION—*Jurisdiction—Secession from a caste—Property purchased by seceding section during period of secession—Reunion of section with the caste—Suit by caste to recover from a seceding member property purchased by seceding section.*] The plaintiff and the defendant belonged to the caste of Visnagra Bráhmans, which in 1841 divided into two sections, known as the big and little sections. While this division continued, *viz.* in the year 1868, certain lands were purchased by the small section in the names of the plaintiff, the defendant, and three other persons. In 1873 the members of the small section, with the exception of the defendant, re-united with the other members of the caste. The lands, however, remained in the possession of the defendant. The plaintiff, on behalf of the caste, brought this suit to recover the lands from the defendant. Both the lower Courts held that the case was not cognizable by the Civil Courts, as it involved a caste question. On appeal by the plaintiff,

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The High Court reversed the decrees of the Courts below, and sent back the case for re-trial. The lands in question had been admittedly purchased out of their own funds and for their own purposes by the members of the caste who had seceded; and the question, as to whom those lands now belonged, being one between the caste and one of the seceding members who had purchased them, could not be a caste question, unless the small seceding section itself could be regarded (and it was not so contended) as a separate and distinct caste. Under these circumstances it was for the Civil Court alone to determine who was entitled to the property, although it might be incidentally necessary for that purpose to enquire into the usage and practice (if any) of caste sections situated as the seceding section of this caste had been, with respect to the property in question. If the lands had been originally the property of the caste, the question would have been between the caste and a section of it, and would have been a caste question, and not cognizable by the Civil Court.

MEHTÁ JETHÁLÁL *v.* JAMIATRÁM LALUBHÁI 225

CERTIFICATE OF SALE—*Decree—Execution—Sale in execution—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.*] The plaintiff as an agriculturist sued the defendant to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction-sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband) and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he failed to prove his title, and accordingly directed that the mortgage account should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant afterwards found his sale-certificate and obtained a review of the above order, but on review the Subordinate Judge confirmed his decision, holding that as the sale-certificate was unregistered, it could not be received in evidence. The defendant then obtained a fresh certificate, registered it, and renewed his application to the Subordinate Judge, who reversed his previous order, and rejected the plaintiff's claim. The plaintiff appealed to the District Judge, who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court,

Held, that the order of the District Judge should be discharged. A sale certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed, or his representative, cannot, after the sale has been confirmed, dispute the title of the purchaser at the sale. The order confirming the sale completes the title of the latter as against the former.

KHUSHÁL PÁNÁCHÁND *v.* BHIMÁBÁI 589

CHAMPERTY—*Agreement to divide property after litigation if successful—Furnishing money under such agreement.*] An agreement to furnish money for litigation on the terms of sharing the property to be recovered thereby is not necessarily void in India, unless accompanied by circumstances which lead to the conclusion that it was not a "*bonâ fide* one for the acquisition of an interest in the subject-matter of litigation, but an illegitimate transaction got up for the

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purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive."
TÁRÁCHAND *v.* SUKLÁL 559

CHARITY—*Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account—Jurisdiction of Civil Courts in cases relating to public charities—Right to sue—Civil Procedure Code (Act X of 1877), Sec. 539—"Direct interest," meaning of—Practice—Application to put in evidence in appeal which applicant refused to produce at first hearing.*] 1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of section 539 of the Code of Civil Procedure (Act X of 1877).

2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty or at least protect it. A trust is not required for this purpose as it is by English law.

3. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for mal-administration by a suit open to any one interested, as under the Roman system in a like case by means of a *popularis actio*.

The plaintiffs, as relators, filed this suit, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Ráiji at Dákor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dákor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *shevaks* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. They remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhamdár* or store-room.

The god Shri Ranchhod Ráiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity of cash, ornaments, clothes, and other articles, amounting in value to about a lákh of rupees in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *inám* villages, of which Dákor and Kanjri yielded the largest income.

The plaintiffs sued as persons interested in the maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income

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of the temple had largely increased, and had been wrongly appropriated by the defendants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management.

The defendants answered *(inter alia)* that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under section 539 of Act X of 1877; that they themselves were owners of the idol and of the idol's property, and that as such they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past.

The District Judge dismissed the suit, on the preliminary ground that except the first plaintiff who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

Held, reversing the decision of the District Judge, that plaintiffs Nos. 2—5, as priests residing at Dákor and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance.

Held, further, that the *shevaks* were not the owners of the offerings made to the idol. As recipients of those offerings, they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management.

The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it:

The jurisdiction of the Civil Courts in matters of this kind discussed.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of Appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce.

Held, that the evidence could not be admitted.

MANOHAR GANESH TÁMBEKAR *v.* LAKHMIRÁM GOVINDRÁM ... 247

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 2, 241 AND 617—*Decree—Stay of execution—Amount of security required on granting stay of execution, a question in execution and order thereon*

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appealable.] The defendant in a redemption suit, against whom a decree had been passed, appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court, under section 617 of the Civil Procedure Code (Act XIV) of 1882.

Held, that no reference would lie under section 617 of the Civil Procedure Code. The question as to the amount of the security was a question relating to execution as contemplated by section 244 of the Code, and, therefore, an order determining that question would be appealable under section 2 of the Code.

MAHANT ISHWARGAR *v.* CHUDASAMA MANÁDHÁI ... 30

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 30 AND 622—*Fishery—Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act I of* 1877, *Sec.* 9—*Practice—Objection under Section* 30 *where suit is under Section* 9 *of Specific Relief Act.*

See FISHERY 221

——— SEC. 37—*Recognized agent—Agent's right to execute decree obtained by him as agent—Waiver—Execution of decree.*] P. filed a suit in the Second Class Subordinate Judge's Court at Mahád. As P. resided at Thána, outside the jurisdiction of the Court of Mahád, she authorized her agent, under a general power of attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in P's favour. The agent then sought to execute the decree. The Court at Mahád passed an order upon his *darkhást* granting only partial execution. Against this order the agent filed an appeal in the District Court at Thána. Then, for the first time, the judgment-debtors challenged the agent's right to represent P. who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed.

Held, that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent P. at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation.

PÁRVATIBÁI *v.* VINÁYEK PÁNDURANG 68

——— SEC. 174—*Production of document—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Indian Penal Code (Act XLV of* 1860), *Sec.* 175—*Criminal Procedure Code (Act X of* 1882), *Sec.* 480.] A witness was summoned to produce a document in Court in connection with a certain suit. He attended the Court, but did not produce the document, stating on oath that it was not in his possession But this statement was disbelieved, and the Court fined him Rs. 75, under section 174 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the fine was illegally levied. The jurisdiction of the Court to punish under section 174 of the Civil Procedure Code

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exists only in the case of a witness, who, not having attended on summons, has been arrested and brought before the Court.

The case of a witness who having a document will not produce it is provided for by section 175 of the Indian Penal Code (Act XLV of 1860) and section 480 of the Code of Criminal Procedure (Act X o 1882).

Where a witness denies, on oath, that he has the possession or means of producing a particular document, he can, if he has been guilty of falsehood, be prosecuted for giving false evidence in a judicial proceeding.

IN *RE* PREMCHAND DOWLATRÁM 63

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 235, 295, 490—*Application for execution, necessity of, in order to share in distribution under Section* 295—*Attachment before judgment, effect of—Decree-holder with an attachment before judgment must after decree apply for execution under Section* 235 *in order to share in distribution.*] A decree-holder who has attached before judgment is not entitled to rank under section 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution, and as such to obtain, in execution, a rateable share of the property which he has attached, unless, subsequently to his decree, he has applied for execution under section 235 *et seq.* of the Civil Procedure Code.

Under section 230 of the Civil Procedure Code all decree-holders if desirous of enforcing their decrees, are required to apply for execution. There is no exception of cases arising under section 490.

Section 490 of the Civil Procedure Code (Act XIV of 1882) does not *by implication* confer upon a decree-holder who has attached before judgment the right to come in under section 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution.

PÁLLONJI SHÁPURJI MISTRY *v.* EDWARD VAUGHAN JORDAN ... 400

—SEC. 244—*Decree—Execution—Construction—Acts VIII of* 1859, *Sec.* 387; *XXIII of* 1861, *Sec.* 11.] The father of the defendant in 1853 obtained a decree against the father of the plaintiff and other persons for partition of village lands.

The decree directed that in effecting the partition certain *dhára* lands then occupied by the plaintiff's father were not to be included. Application for execution of that decree was made in 1861, but the execution proceedings remained pending until 1882. On the 12th December, 1882, the decree was executed, and the defendant (his father being then dead) was put into possession of the lands now in dispute as being part of the lands to which he was entitled under the decree. The plaintiff objected that these lands were not subject to partition under the decree, and he applied for an order that they should be delivered back to him. His application was rejected, and he thereupon brought the present suit to recover the lands from the defendant. The Court of first instance was of opinion that the question raised in the suit related to the execution of the decree made in 1853, and under section 244 of the Civil Procedure Code (Act XIV of 1882) could not be raised again by a separate suit. The plaintiff appealed to the Assistant Judge, who reversed the lower Court's decree. On appeal by the defendant to the High Court,

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Held, reversing the decree of the lower Appellate Court, that the plaintiff's suit should be dismissed The question whether the *dhara* lands received by the defendant in execution of the decree of 1853 were included in that decree, was a question relating to the execution of the decree within the meaning of section 244 of the Civil Procedure Code (Act XIV of 1882), which barred a separate suit
RAGHUNÁTH GANESH *v* MULNA AMAD 449

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC 257A — *Decree—Havala or undertaking by a third party to pay decreed debt for the judgment debtor—Agreement incorporating the havala, in substitution of the decree, capable of execution at the date of the agreement —Suit on such agreement*] The plaintiff obtained a money decree against the defendant Hur Patel and in execution thereof attached his property Thereupon, at Hur Patel's request, five persons gave a *havála* or oral undertaking to pay the amount of the decree and the attachment was removed It appeared that some payment was made under the *havála* Subsequently Hur Patel and the defendants Nos 2 and 3 executed a bond to the plaintiff reciting the *havála*, the payment thereunder, and agreeing to pay the amount of the decree with interest Neither the *havála* nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed The plaintiff now sued to recover the debt due under the bond The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void On reference to the High Court,

Held, that the whole bond was void The *havala* was an agreement such as is contemplated in paragraph 1 of section 257A of the Civil Procedure Code (Act XIV of 1882), and was void for want of sanction of the Court under that section The bond, regarded as one in consideration of the *havála* or as an agreement for satisfaction of the decree, was also void under paragraph 2 of the same section for a similar reason
VISHNU VISHWANATH *v* HUR PATEL 499

——————————————SEC 258—*Decree, satisfaction of, out of Court—Payment uncertified—Suit to recover money paid in satisfaction of decree*] The plaintiff had been a surety for the defendant on a bond for Rs 50 passed to G by the defendant G obtained a decree against the plaintiff on this bond, and the plaintiff satisfied the decree by paying G Rs 38 in full satisfaction The payment was made out of Court, and was not certified to the Court The plaintiff now sued the defendant to recover the money so paid by him to G He called G as a witness, who acknowledged he had received Rs 38 from the plaintiff in full satisfaction of the decree

Held, that the last clause of section 258 of the Civil Procedure Code (Act XIV of 1882) did not apply to such a case, and that the payment made by the plaintiff to G might be proved
BÁLÁJI LAKSHMAN *v* DÁDA JOTI ..

——————————————SEC 266 (c)— *Building site—Agriculturist bhágdar—Bhagdári Act (Bom Act V of 1862)—Decree—Execution against bhág*] A, having obtained a decree against B, who was a *bhagdár* attached his *bhág* in execution, including the *gabhán*, or site upon which B's house was built B applied to have the attachment removed from the *gabhan*, on the

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ground that he was an agriculturist, and that, therefore, the *gabhán* of his house was protected from attachment by clause (c) of section 266 of the Civil Procedure Code (Act XIV of 1882).

Held, that the *gabhán* was subject to attachment, and was not protected by the above clause. B. did not hold as an agriculturist. He could not have occupied the house, except as a *bhágdár*, and it was as part of a *bhág* that the site was attached. The protection of section 266, clause (c), was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.

JIVAN BHÁGÁ *v.* HIRÁ BHÁJI 363

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 266(*f*)—*Vritti—Jotishipaná vritti—Liability to attachment in execution of a decree—Nature of vrittis under Hindu law.*] The *jotishi vritti*, being a right to receive certain emoluments as a reward for personal service, is not liable to attachment under section 266 (*f*) of the Code of Civil Procedure (Act XIV of 1882).

Semble—Under the Hindu law, *vrittis* are to be regarded as generally *extra commercium*.

GOVIND LAKSUMAN JOSHI *v.* RÁMKRISHNÁ HARI JOSHI ... 366

——SECS. 274 AND 289—*Sale—Proclamation—Property broken up into lots—Separate proclamations—When necessary.*] Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided.

A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale.

Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on, or interested in, the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done.

PEDRO ANTONIO DE PENHA *v.* JA'LBHOY ARDESHIR SET ... 368

——SEC. 349—*Court, power of, to release judgment-debtor after he is imprisoned—"Arrest" and "imprisonment."*] "Arrest," as used in section 349 of the Civil Procedure Code (Act XIV) of 1882, does not include "imprisonment." Therefore the power conferred on the Court, under that section, to release a judgment-debtor arrested in execution of a decree on security being given by him, ceases after he has been imprisoned or put into jail.

MAHOMED HUSEIN *v.* RÁDHI 46

——SECS. 354, 355, AND 356—*Insolvency—Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.*] By an order dated the 9th July, 1879, A. was declared an insolvent under section 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was con-

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sequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it.

Held, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under section 354, he, under section 356, was directed to convert it into money. G., therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G.'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done.

The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with section 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.

SHRIDHAR NÁRÁYAN *v.* KRISHNÁJI VITHOJI 272

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 484 AND 545 —*Sureties—Right of surety to appeal—Extent of their liability—Attachment before judgment—Security under Section* 484 *of Civil Procedure Code* (*XIV of* 1882)—*Decree—Stay of execution by Appellate Court—Fresh security under Section* 545 *of Civil Procedure Code* (*XIV of* 1882)—*Liability for original sureties.*] A surety against whom a decree is sought to be enforced under section 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution proceedings.

A. and B. became sureties, under section 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of property attached before judgment by the Court of first instance. Under their surety-bonds, they were bound, in default, "to pay to the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favour for Rs. 229-14. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under section 545, "for the due performance of such decree or order as may *ultimately* be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favour for Rs. 800 and costs.

Thereupon the decree-holder sought to enforce the appellate decree against the sureties A. and B. under section 253 of the Civil

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Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond, which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security.

Held, (1) that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of first instance was for the satisfaction of its decree—not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the term on which it would take security for the execution of its own decree.

Held, also, that as soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability, having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease because the decree of the first Court merged in that of the Appellate Court.

SHEK SULEMAN *v.* SHIVRÁM BHIKÁJI 71

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 545, 244, (CL. 3), 588, AND 2—*Practice—Appeal—Order rejecting stay of execution appealable.*] An order by a District Judge, under section 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution is a decree as defined in section 2, and is, therefore, appealable.

MUSÁJI ABDULLÁ *v.* DÁMODARDÁS 279

SEC. 617—*Pleader—Professional conduct.*] Section 617 of the Code of Civil Procedure (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is to pronounce on the opposite pretensions of contending parties.

A pleader was fined Rs. 25 by a Second Class Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the inquiry into the pleader's professional conduct was of a disciplinary, and not litigious, character. The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious. In such an inquiry no reference could properly be made under section 617 of Act XIV of 1882.

YESHVANT NÁRÁYAN ADARKAR *v.* XAVIER J. J. V. DESOUZA. 78

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 622—*Limitation—High Court's revisional powers—Revision—Material irregularity.*

See REVISION 617

COMPANY—*Indian Companies Act VI of* 1882, *Sec.* 45—*Member—Signing unregistered copy of memorandum of association—Agreement to become a member—Proposal—Acceptance—Repudiation before registration of company.*] On the 13th April, 1886, Lamb signed a printed copy of the proposed memorandum of association of a projected company for ten shares which on the 3rd August was registered as the Imperial Flour Mills Company. On that day, *viz.* the 3rd August, 1886, Lamb received a notice from the secretary of the company, informing him that the company had been duly registered, and requesting him to pay Rs. 100 as the deposit on the shares subscribed by him. On the 5th August, Lamb replied, stating that he had decided not to take up the shares. On the 6th August the secretary wrote to Lamb, stating that he had already become a shareholder, and could not withdraw. On the 25th September the directors held their first meeting, and resolved that the "shares applied for be allotted, and application and allotment monies be called in." On the 1st October the secretary notified to Lamb the allotment of ten shares, and requested him to pay the overdue deposit call of Rs. 10 *per* share and the allotment call of Rs. 15 *per* share. Lamb refused to pay, and repudiated his liability in respect of the shares. He contended that he had never become a member of the company.

Held, that the defendant was not a member of the company, and was not liable to the plaintiff's claim. The fact that he had signed the proposed memorandum of association did not make him a member, inasmuch as the document which he had signed was not the document which was registered, nor even a true copy of it. Nor could the defendant be held bound as having agreed to become a member within the meaning of section 45 of the Indian Companies Act VI of 1882. The agreement which binds a party under this section must be an agreement with the company itself. The company not being in existence at the date of the defendant's signing the memorandum of association (*viz.* the 16th April, 1886), that signature could amount, at the most, to an application for shares to the promoters, which by reason of its non-withdrawal before the registration of the company on the 3rd August became on that day an application to the company. There could be no acceptance of that application until the company was registered; and the defendant withdrew his application by his letter of the 5th August. The letter written by the company's agents on the 3rd August was not an acceptance. It was only a request for the payment of the deposit on the shares for which the defendant had applied, and which was required as a guarantee for the *bona fides* of the application. Further, the terms of the resolution of the board of directors of the 25th September made it clear that up to that date the defendant's application had not been made a binding agreement by acceptance. His repudiation, therefore, of the 5th August was in time, and he could not be held liable as a shareholder of the company.

Held, also, that in no case could the defendant have been bound by the letter of the 3rd August written by the agents of the company. That letter was written, not by order of the directors at a meeting duly convened and composed of the proper quorum of four.

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It was written by the secretary after consulting separately three only of the directors This was an irregular proceeding, which would not bind the company or the subscribers with regard to the application on and acceptance of shares The directors did not act as a board, nor was the consent of a quorum obtained

THE IMPERIAL FLOUR MILLS COMPANY, LIMITED, *v.* W. T. LAMB 647

COMPANY—*Memorandum of association—Effect of signing memorandum—Withdrawal of signature before registration of memorandum—Indian Companies Act VI of* 1882, *Sec* 45] A person who signs a memorandum of association for a number of shares becomes absolutely bound to take those shares The statutory liability, the creation of the agreement, commences with the signature of the memorandum, and is not held in suspense until the memorandum is registered There is no *locus pœnitentiæ* up to the date of registration, and no person who has signed the memorandum can, acting independently of the others, cancel his signature

IN *RE* THE MACHINE EXCHANGE COMPANY, LIMITED ... 311

———*Winding up—Resolution to wind up—Dissentient shareholders—Notice of dissent—Requirements of such notice—Indian Companies Act VI of* 1882, *Sec* 204] The shareholders of the Gordon Mills having passed a resolution for the voluntary winding up of the company, five dissentient shareholders gave notice of their dissent by a letter to the liquidators in the following terms —

"With reference to the resolutions to wind up the above company voluntarily, and which were passed and confirmed on 14th instant, we hereby give you notice under section 204 of the Indian Companies Act VI of 1882, and require you to purchase the interest held by us in the said company at such price as may be determined either by private arrangement or by arbitration, as we are dissentients from such resolutions"

Held, that the letter was a sufficient notice of dissent under the provisions of section 204 of the Indian Companies Act VI of 1882

MOTIRÁM BHAGUBHAI *v.* THE GORDON MILLS, LIMITED, IN LIQUIDATION 526

CONSTRUCTION—*The Nawáb of Surat Act XVIII of* 1848, *Sec* 1—"*Sue forth*," *meaning of—Sanction obtained after suit filed*] The expression "sue forth" in section 1 of Act XVIII of 1848 does not mean to sue for and to obtain so as to make the consent of the Governor a condition precedent to the institution of a suit

Accordingly where the grand-daughter of the Nawáb of Surat was sued along with her husband without previously obtaining the required consent, and it was contended that the suit was irregularly instituted, and the proceedings thereunder void,

Held, that the suit was rightly instituted, such a consent not being a condition precedent to the filing of the suit

ZIAULNISA BEGAM *v.* MOTIRÁM 496

———OF ACT—*Power given in Act for public benefit*] Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage

E. C K OLLIVANT *v.* RAHIMTULA NUR MAHOMED. ... 474

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CONTRACT—*Sale of goods—Non-acceptance of goods—Contract for goods to be ordered from Europe—Such contract not fulfilled by offer of goods of same description not ordered out for purchasers, but bought by vendors in Bombay.*] On the 7th August the defendants commissioned the plaintiffs to order out from Europe 500 cwts. copper braziers, September shipment, assorted in the manner set out in the indent signed by the defendants, "free on board Bombay harbour," at the rate of £ 53-5 *per* ton. On the same day the plaintiffs sent a reply to the defendants' order in their usual form, partly lithographed and partly written, as follows :—"We have the pleasure to inform you that we have received a telegram from our Manchester friends, and so far as the cyphers therein used, we learn that they advise the following purchases, which will be invoiced to you at your limit, subject to confirmation by letter as usual. Order this day 100 bundles of copper braziers, at £53-5 *per* ton, free on board, Bombay." As a fact, however, no telegram had been received from the plaintiffs' Manchester friends, and the plaintiffs had not learned that they had advised the purchases referred to in their reply. The acceptance of the plaintiffs' offer was really based on the plaintiffs' view of the probabilities of the copper market. The agents in England were unable to carry out the order, and it remained unexecuted. On the 26th October the plaintiffs, having negotiated with one Naga Ducha to take over from him a September shipment of copper by the S. S. *Merton Hall*, answering to the defendants' order, and for the purpose of fulfilling it, wrote to the defendants as follows :—"We beg to inform you of the arrival of the S. S. *Merton Hall* with 100 packages of goods sold to you as *per* agreement No. 213; and have, therefore, to request payment of the cash for those goods, according to the terms of the agreement." The plaintiffs' negotiation, however, with Naga Ducha fell through, and they were unable to supply the defendants with the goods from the *Merton Hall*. The defendants on th 30th October wrote through their solicitors to the plaintiffs, stating that they believed the goods never came to Bombay, and that they considered the contract at an end. The plaintiffs, however, on the 29th October had succeeded in purchasing a September shipment of goods from one Beg Mahomed, corresponding to those ordered by the defendants. They then on the 31st October wrote to the defendants, informing them that it was a mistake of their clerk to advise the arriva of the defendants' goods *per Merton Hall*, and handing the defendants invoice of 100 bundles arrived *ex Tuban Head*. The defendants discovered that the plaintiffs had not ordered out these goods, but had purchased them in Bombay, and on that ground they refused to accept them. The price of copper had then fallen. The plaintiffs sold the goods by auction, and brought this suit against the defendants, to recover the difference between the price realized by the sale and the price which by their contract the defendants had agreed to pay. It was admitted by the plaintiffs' witnesses that it was intended, at the time the defendants gave their order, that the goods should be ordered out from England by the plaintiffs ; and that this was the invariable course of business of the plaintiffs' firm—the present case forming the only instance to the contrary.

Held, that the defendants were not bound to accept the goods offered by the plaintiffs ; and that the plaintiffs were not entitled to recover the amount sued for.

An importing firm which accepts a commission to order out goods at a fixed rate, and undertakes that they shall be invoiced to the person giving the order at that rate does not (in the absence of proof of usage to the contrary) fulfil his contract by obtaining goods

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answering to the terms of the order from another firm in Bombay and tendering them to the person giving the order.
THE BOMBAY UNITED MERCHANTS' COMPANY, LIMITED, *v.* DOLUBRA'M SA'KULCHAND 50

CONTRACT—*Wagering contract—Wager—Evidence—Evidence Act I of 1872, Sec. 92, Proviso 1—Bombay Act III of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.*
See WAGER... 585

———ACT IX OF 1872, SECS. 23, 24—*Contract—Illegal contract—Contract entered into in violation of the law—Partnership—Illegal partnership—Right of partner to sue for a share—Contract Act (IX of 1872), Secs. 23, 24—Abkári Act (Bombay Act V of 1878), Sec. 45—Breach of license—Penalty.*] A contract entered into for the purpose or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto.*

A. and B. took a liquor contract from the Government. By the terms of their license they were forbidden to take a partner, and under section 45 of the Bombay Abkári Act (V of 1878) they were liable to a penalty of Rs. 100 for a breach of their license. C. entered into partnership with A. and B. with full knowledge of the conditions of the license, and afterwards filed a suit for an account of the partnership transactions.

Held, that C. was not entitled to any relief, having entered into the partnership in direct violation of the law.
HORMASJI MOTÁBHÁI *v.* PESTONJI DHANJIBHÁI 422

COURT FEES ACT VII OF 1870, SEC. 11—*Execution of part of decree—Payment of full amount of court-fees not necessary for such part execution—Construction.*] The plaintiff sued the defendant to recover possession of a house and for mesne profits. In the same suit he also claimed certain account books and documents from the defendant. In paying court-fees he estimated the mesne profits at Rs. 151, and paid in that amount. He obtained a decree, and the amount of mesne profits awarded to him was Rs. 3,349-13-3. The decree further directed that possession of the house should be given to him, and that the books and documents should be handed over to him. He now applied for execution of that part of the decree which directed the delivery of the house and of the account books and other documents. The defendant contended that, under section 11 of the Court Fees Act VII of 1870, the plaintiff was not entitled to execution of any part of the decree until he paid the proper court-fees on the sum awarded as mesne profits, *viz.*, Rs. 3,349-13-3.

Held, that the plaintiff might obtain execution of that part of the decree which ordered delivery of the house and books and documents without paying the fees payable on the amount awarded for mesne profits. Section 11 and section 17 of the Court Fees Act VII of 1870 ought to be similarly construed; and the language of the latter section, which deals with multifarious suits, shows that for the purposes of the stamp revenue such suits are deemed to be a collection of distinct suits relating to the several causes of action combined in them. In applying section 11 to such suits, in order to give a harmonious construction to the Act as a whole, the term "suit" in that section should be construed as confined to that part of the suit in question which related to mesne profits.
FULCHAND *v.* BÁI ICHHÁ 18

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CRIMINAL PROCEDURE CODE (ACT X OF 1882), SECS. 155, 202, AND 203—*Magistrate's power to direct a local investigation by the police—Complaint of an offence cognizable by a Magistrate—Examination of complainant.*] Section 155 of the Code of Criminal Procedure (Act X of 1882) deals only with the powers of police officers. It confers no power or authority on Magistrates to direct a local investigation by the police, or call for a police report.

It is not a proper course for a Magistrate, when a complaint is made before him of an offence of which he can take cognizance, to refer the complaint to a police officer. He is bound to receive the complaint, and after examining the complainant to proceed according to law.

IN *re* JA'NKIDA'S GURU SITA'RA'M 161

SEC. 195—*Sanction to prosecute—Sub-Registrar—Forgery—Indian Penal Code (Act XLV of 1860), Secs. 463, 467—Court—Judicial inquiry—Administrative inquiry.*] A Sub-Registrar under the Registration Act (III of 1877) is not a Judge, and, therefore, not a 'Court' within the meaning of section 195 of the Code of Criminal Procedure (Act X of 1882). His sanction is, therefore, not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office.

The word 'Forgery' is used as a general term in section 463 of the Indian Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in section 195 of the Criminal Procedure Code (Act X of 1882) so as to embrace all species of forgery, and thus includes a case falling under section 467 of the Indian Penal Code.

The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope.

Distinction between a *judicial* and an *administrative* inquiry pointed out.

QUEEN-EMPRESS *v.* TULJA' ... ...

DAMAGES—*Agreement to lend money—Damages recoverable by lender for breach of such agreement—Contract Act IX of 1872, Secs. 73 and 74.*] The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of Rs. 20,000 at 7½ *per cent. per annum* for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March, 1887, and that the plaintiff's attorneys had prepared the necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 *per cent. per annum*, and his *munim* took it to the attorneys' office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed, as damages, interest on the Rs. 20,000 at 1½ *per cent. per annum* for the three years for which under the agreement the loan was to be made.

Held, that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the Rs. 20,000 at the rate of interest agreed upon

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between him and the defendant. The Court accordingly awarded him interest at 1½ *per cent. per annum* (*i.e.* the difference between the banker's rate of interest and the contract rate) on Rs. 20,000 for four months, together with the expense of preparing the deeds required for the purpose of the loan.

DATUBHA'I EBRÁHIM *v.* ABUBAKER MOLEDINA' 242

DECREE—*Dekkhan Agriculturists' Relief Acts* (*XVII of* 1879), *Sec.* 20, *and Act XXII of* 1882, *Sec.* 15*B*.—*Payment of decree by instalments—Default—Whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.*] Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorize a variation of any order once so made. Nor does section 20 of Act XVII of 1879 authorise a series of instalment orders each one varying from the preceding.

A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused, but the Subordinate Judge in appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in.

Held, that the Subordinate Judge in appeal had no power to make a fresh order for payment by instalments varying the original order.

Held, also, that the judgment-creditor, by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments, did not bind himself to abide by that order.

BÁLKRISHNA INDRABHAU *v.* A'BÁJI BIN BAHIRJI MORE ... 326

———*Execution—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 244—*Construction—Acts VIII of* 1859, *Sec.* 387; *XXIII of* 1861, *Sec.* 11.] The father of the defendant in 1853 obtained a decree against the father of the plaintiff and other persons for partition of village lands.

The decree directed that in effecting the partition certain *dhára* lands then occupied by the plaintiff's father were not to be included Application for execution of that decree was made in 1861, but the execution proceedings remained pending until 1882. On the 12th December, 1882, the decree was executed, and the defendant (his father being then dead) was put into possession of the lands now in dispute as being part of the lands to which he was entitled under the decree. The plaintiff objected that these lands were not subject to partition under the decree, and he applied for an order that they should be delivered back to him. His application was rejected, and he thereupon brought the present suit to recover the lands from the defendant. The Court of first instance was of opinion that the question raised in the suit related to the execution of the decree made in 1853, and under section 244 of the Civil Procedure Code Act XIV of 1882 could not be raised again by a separate suit. The plaintiff appealed to the Assistant Judge, who reversed the lower Court decree. On appeal by the defendant to the High Court,

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Held, reversing the decree of the lower Appellate Court, that the plaintiff's suit should be dismissed. The question whether the *dhára* lands received by the defendant in execution of the decree of 1853, were included in that decree, was a question relating to the execution of the decree within the meaning of section 244 of the Civil Procedure Code (Act XIV of 1882), which barred a separate suit.

RAGHUNÁTH GANESH *v.* MULNA AMAD 449

DECREE—*Execution —Civil Procedure Code (Act XIV of* 1882), *Sec.* 265—*Execution of decree—Decree for partition —Land Revenue Code (Bombay Act V of* 1879), *Sec.* 113—*Collector's powers in executing partition decrees—Civil Court's jurisdiction to control Collector's action—Practice—Persons not parties to proceedings in appeal not bound by the result of those proceedings.*] Decrees in three separate suits for partition of a certain estate having been referred to the Collector of Ratnágiri for execution under the Civil Procedure Code (Act XIV of 1882), section 265, Bhiv Sávant and Rámchandra Gopál (brother of the first appellant), who were parties to the suits, objected to the Collector's mode of partition, and applied to the Court to set aside the Collector's scheme, and to direct a fresh partition. The Subordinate Judge of Vengurla granted the application, and set aside the partition ordered by the Collector. Against this order, Vásudev Vithal Sávant, who was plaintiff in one of the suits, appealed to the District Court, and in the appeal he made Bhiv Sávant alone the respondent. The District Court reversed the order of the Subordinate Judge, and upheld the order of the Collector. Thereupon Bhiv Sávant preferred a second appeal to the High Court against the decision of the District Court. To this appeal neither Rámchandra Gopál nor his brother, the present appellant, were made parties. The High Court having confirmed the decision of the District Court, proceedings were taken to carry out the partition according to the Collector's original scheme. The appellant objected, on the ground that the Collector's scheme had been set aside by the Subordinate Judge, and that he (the appellant) had not been a party to the proceedings in either of the appellate Courts. He contended that he was, therefore, not bound by the decisions of the Appellate Courts, and that the order of the Subordinate Judge, setting aside the partition ordered by the Collector, was still in force so far as he was concerned. He, therefore, applied that the property should be divided in accordance with that order. His application was rejected by the Court of first instance as time-barred, inasmuch as more than a year had elapsed since the date of the order of the Subordinate Judge, and during that time the applicant had taken no steps to enforce the order. In appeal, the Acting District Judge confirmed the order of the lower Court, holding that the order of the Subordinate Judge was no longer in force, having been set aside by the High Court. On second appeal to the High Court,

Held, that the appellant was not bound by the final decision of the High Court. The original order being in his favour, he could not be deprived of the benefit of that order without having the opportunity to defend it. Not having been a party to the proceedings in appeal, he was not affected by the result of those proceedings.

Where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further

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appeal, he cannot represent a person who was not his co-respondent, and against whom, therefore, no decree could have been made on a point common to the two, or on any point at all.

Held, nevertheless, that the appellant could not succeed in the present appeal, the object of which was to revive the order of the Subordinate Judge. That order was one which the Subordinate Judge had no power to make. It involved taking the execution of the decree for partition out of the Collector's hands into his own, in direct contradiction of the law. In case of partition of lands, section 265 of the Civil Procedure Code (XIV of 1882) and section 113 of Bombay Revenue Code (Bombay Act V of 1879) place the execution of the decree entirely in the Collector's hands. This does not deprive the Court of judicial control of its decree; as, for instance, if it should appear to have been obtained by fraud or surprise; but in the present case nothing of that kind was relied on. Nor was it asserted that the Collector had acted in bad faith, or contravened the command of the Court, or transgressed the law. What was alleged was that he had made an objectionable partition. This was not a ground on which the Subordinate Judge could interfere.

DEV GOPÁL SÁVANT *v.* VÁSUDEV VITHAL SÁVANT ... 371

DECREE—*Execution—Civil Procedure Code (Act XIV of 1882), Sec. 266 (f)—Vritti—Jotishipaná vritti—Liability to attachment in execution of a decree—Nature of vrittis under Hindu law.*] The *jotishi vritti*, being a right to receive certain emoluments as a reward for personal service, is not liable to attachment under section 266 (*f*) of the Code of Civil Procedure (Act XIV of 1882).

Semble—Under the Hindu law, *vrittis* are to be regarded as generally *extra commercium*.

GOVIND LAKSHMAN JOSHI *v.* RÁMKRISHNA HARI JOSHI ... 366

———*Execution—Declaratory decree—Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.*] In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant 12 *per cent.* of the rents and profits of a certain *inám* village. The decree also awarded mesne profits from the date of the institution of the suit.

In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84.

Held, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a terminus *ad quem* as well as *á quo*, and in the absence of a special order the terminus was the date of the decree.

VINÁYAK AMRIT DESHPÁNDE *v.* A'BÁJI HAIDATRÁV... ... 410

———*Execution—Decree specifying a certain time for execution—Construction—Condition precedent—Limitation.*] The plaintiff obtained a decree on the 25th July, 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Márgshirsha* (*i. e.*, 9th January, 1883), and that, on his doing so, the defendant should remove certain hedges and sheds, and

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restore the land in suit to the plaintiff. On the 9th December, 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff, having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree.

Held, that the application was not time-barred. The specification of the end of *Márgashirsha* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution.

The mention of a term when a particular right is to become enforceable, is not a condition precedent, whether the enforcement be otherwise subject to a condition or not.

NÁRÁYAN CHITKO JUVEKAR *v.* VITHUL PURSHOTAM ... 23

DECREE—*Execution—Execution against bhág—Civil Procedure Code (Act XIV of 1882), Sec. 266 (c)—Building site—Agriculturist bhágdár—Bhágdári Act (Bom.) V of 1862.*

See CIVIL PROCEDURE CODE 368

———*Execution—Execution of decree—Limitation—Application for execution in accordance with law—Limitation Act XV of 1877, Sch. II, Art. 179—Decree against a minor—Application for execution against minor's mother personally, but not as his guardian.*] On the 31st July, 1879, a decree was passed against N., a minor, represented by his mother and guardian C. In December, 1880, the first application for execution was made. Through mistake execution was sought against C. herself, as 'widow of B.,' and not as guardian of the minor N. That application was granted, and certain property belonging to the minor was attached. On the 29th November, 1883, the second application for execution was made against the minor as represented by his guardian C. The present application for execution was made on the 3rd December, 1884. This application was rejected as time-barred by the District Court in appeal, on the ground that the first application having been made against a wrong person, could not be taken into account; that, therefore, it could not keep the decree alive, and that the present application was barred.

Held, reversing the decision of the lower Court, that the decree-holder ought not to be deprived of the fruit of his decree on account of a technical defect in his application of 1880. The minor was substantially and for all practical purposes represented by his mother.

HARI *v.* NÁRÁYAN 427

———*Execution—Maintenance—Decree for payment of an annuity without specifying date of payment—Default in paying such annuity—Enforcement of payment by execution of decree—Limitation—Computation of time.*] A Hindu widow obtained a decree, dated 7th September, 1865, directing that a sum of Rs. 36 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, and recovered three years' arrears. In 1885, payments having again fallen into arrear, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application.

Held, that the application was not time-barred. The decree created a periodically recurring right. Though no precise date was

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specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court.
LAKSHMIBÁI BÁPUJI OKÁ *v.* MÁDHAVRÁV BÁPUJI OKÁ ... 65

DECREE—*Execution of decree—Agent—Recognized agent—Civil Procedure Code (Act XIV of 1882), Sec. 37—Agent's right to execute decree obtained by him as agent—Waiver.*
See PRINCIPAL AND AGENT 68

———*Execution of part of the decree—Court Fees Act VII of 1870, Sec. 11—Payment of full amount of court-fees not necessary for such part execution—Construction.*] The plaintiff sued the defendant to recover possession of a house and for mesne profits. In the same suit he also claimed certain account books and documents from the defendant. In paying court-fees he estimated the mesne profits at Rs. 151, and paid in that amount. He obtained a decree, and the amount of mesne profits awarded to him was Rs. 3,349-13-3. The decree further directed that possession of the house should be given to him, and that the books and documents should be handed over to him. He now applied for execution of that part of the decree which directed the delivery of the house and of the account books and other documents. The defendant contended that, under section 11 of the Court Fees Act VII of 1870, the plaintiff was not entitled to execution of any part of the decree until he paid the proper court-fees on the sum awarded as mesne profits, *viz.*, Rs. 3,349-13-3.

Held, that the plaintiff might obtain execution of that part of the decree which ordered delivery of the house and books and documents without paying the fees payable on the amount awarded for mesne profits. Section 11 and section 17 of the Court Fees Act VII of 1870 ought to be similarly construed; and the language of the latter section, which deals with multifarious suits, shows that for the purposes of the stamp revenue such suits are deemed to be a collection of distinct suits relating to the several causes of action combined in them. In applying section 11 to such suits, in order to give a harmonious construction to the act as a whole, the term "suit" in that section should be construed as confined to that part of the suit in question which related to mesne profits.
FULCHAND *v.* BÁI ICHHÁ 98

———*Execution—Rateable distribution—Civil Procedure Code (Act XIV of 1882), Secs. 235, 295, 490—Application for execution, necessity of, in order to share in distribution under Section 295—Attachment before judgment, effect of—Decree-holder with an attachment before judgment must after decree apply for execution under Section 235 in order to share in distribution.*] A decree-holder who has attached before judgment is not entitled to rank under section 295 of the Civil Procedure Code (Act XIV of 1882) as an applicant in execution and as such to obtain, in execution, a rateable share of the property, which he has attached, unless, subsequently to his decree, he has applied for execution under section 235 *et seq.* of the Civil Procedure Code.

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Under section 230 of the Civil Procedure Code all decree-holders, if desirous of enforcing their decrees, are required to apply for execution. There is no exception of cases arising under section 490.

Section 490 of the Civil Procedure Code (Act XIV of 1882) does not by *implication* confer upon a decree-holder who has attached before judgment the right to come in under section 295 and share in the distribution of the property which he has attached. The effect of that section is merely to take away the necessity for a re-attachment of the property. The attachment before judgment enures and becomes an attachment in execution.

PÁLLONJI SHÁPURJI MISTRY *v.* EDWARD VAUGHAN JORDAN ... 40

DECREE—*Execution—Sale—Proclamation—Civil Procedure Code (Act XIV of 1882), Secs. 274 and 289—Property broken up into lots—Separate proclamations, when necessary.*] Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided.

A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale.

Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on, or interested in, the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done.

PEDRO ANTONIO DE PENHA *v.* JÁLBHOY ARDESHIR SET ... 368

———*Execution—Sale in execution—Certificate of sale—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.*] The plaintiff as an agriculturist sued the defendant to redeem certain land mortgaged to him with possession by her deceased husband. The defendant (the mortgagee) pleaded that he had bought the mortgagor's interest in the property at an auction sale held in execution of a decree obtained against the mortgagor (the plaintiff's husband) and that, therefore, the right to redeem was gone. The defendant was, however, unable to produce a certificate of sale, and the Subordinate Judge held, therefore, that he had failed to prove his title, and accordingly directed that the mortgage account should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879). The defendant afterwards found his sale-certificate, and obtained a review of the above order, but on review the Subordinate Judge confirmed his decision, holding that as the sale-certificate was unregistered it could not be received in evidence. The defendant then obtained a fresh certificate, registered it, and renewed his application to the Subordinate Judge, who reversed his previous order and rejected the plaintiff's claim. The plaintiff appealed to the District Judge, who reversed the lower Court's order and remanded the case. On appeal by the defendant to the High Court,

Held, that the order of the District Judge should be discharged. A sale-certificate was not necessary for the purpose of establishing the defendant's title to the property as against the plaintiff. Where property has been sold in execution of a decree, a party to the suit in which the decree has been passed, or his representative, cannot, after the sale has been confirmed dispute the title of the pur-

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chaser at the sale. The order confirming the sale completes the title of the latter as against the former.

KRUSHÁL PÁNÁCHAND *v.* BHIMÁBÁI 589

DECREE—*Execution—Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution proceedings.*] K., a Mahomedan woman who was a co-sharer in a certain *khoti vatan*, died indebted, and was sued after her death as "represented by her minor son represented by his guardian." A decree having been obtained against K. as so represented, her share in the *khoti* was put up for sale in execution, and was purchased by the plaintiff, who obtained a sale certificate reciting that the right, title, and interest of K. in the said *khoti* had been purchased by him. He now sued the defendants, who were K.'s co-sharers in the *khoti*, to recover the profits of K.'s share which they had received.

K., besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff.

Held, that the plaintiff was entitled to the whole of K.'s share. The debt due by K. was one for which the daughter was equally responsible; and having regard to the form of the suit and the execution proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of K.'s share, and would acquire a title unimpeachable by the daughter.

KHURSHETBIBI *v.* KESO VINÁYEK 101

———*Jurisdiction—Execution—Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Practice—Procedure.*] The plaintiff, having obtained a decree against the defendant in the Court at Bhusával, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusával and Nágpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusával Court to the defendant's disbursing officer at Nágpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusával Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusával. On reference to the High Court,

Held, that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusával Court. The proper procedure was to send the decree of the Bhusával Court for execution to Nágpur, where the disbursing officer resided, and the defendant's pay was available for satisfaction of the decree.

RANGO JAIRA'M *v.* BA'LKRISHNA VITHAL 44

———*Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Res judicata—Practice—Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point.*] The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September, 1871, by which certain landed properties were to be divided, as specified in the agreement, between them and the defendants. The case came on for hearing on the 13th September, 1878. The defendants did

not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, and referred the suit to the Commissioner for the preparation of conveyances, &c. The decree was sealed on the 9th October, 1878. No further steps were taken by any of the parties for six years, and in September, 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order, being of opinion that he was not authorised to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November, 1884, gave notice to the plaintiffs that they would apply to the Court—(1) "to set aside or vary its order of the 13th September, 1878, so far as it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September, 1885, on which day it was dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April, 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September, 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs and defendants respectively. The plaintiffs contended that the application was barred by lapse of time, and that the question was *res judicata* by the order of the 10th September, 1885.

Held, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, as against the plaintiffs having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them.

Held, also, that the motion was not *res judicata* by reason of the previous order of the 10th September, 1885. Although the notice of motion then served by the defendants on the plaintiffs included matters in respect of which the defendants sought relief by their present application, the Judge in making the order dealt with them as ancillary to the first and main point raised in that motion, *viz.*, the defendants' right to set aside the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). Having decided that point against them, he did not really consider the other points at all

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and did not adjudicate upon them, and, therefore, the present application in respect of these matters was not *res judicata*.

Counsel for the plaintiffs contended that the defendants were not entitled, in the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised.

Held, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to the Court was acquiesced in. The objection was then too late.

KARIM MAHOMED *v.* RÁJOOMÁ 174

DEFAMATION—*Republication of defamatory matter already published—Indian Penal Code (Act XLV of 1860), Sec. 499—Dismissal of complaint—Criminal Procedure Code (Act X of 1882), Sec. 203.*] A complaint was filed, under section 499 of the Indian Penal Code, against the proprietors, editor, and printer of a newspaper for publishing matter alleged to be defamatory. The Magistrate, before whom the complaint was lodged, found that the publication complained of was a mere reproduction or republication of what had been previously printed and published in another newspaper. He was, therefore, of opinion that, unless and until criminal proceedings had been taken in respect of the earlier publication, a charge of defamation could not properly be brought with regard to the later publication. He, therefore, dismissed the complaint, under section 203 of the Code of Criminal Procedure (Act X of 1882).

Held, that the order of dismissal was improper. The Indian Penal Code (sec. 499) makes no exception in favour of a second or third publication as compared with a first. If the complaint is properly laid in respect of a publication which is *primâ facie* defamatory, the Magistrate is bound to take cognizance of the complaint, and deal with it according to law.

IN *re* HOWARD 167

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 20, AND ACT XXII OF 1882, SEC. 15 B.—*Decree – Payment of decree by instalments—Default – Whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.*] Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorise a variation of any order once so made. Nor does section 20 of Act XVII of 1879 authorise a series of instalment orders each one varying from the preceding.

A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default. Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused, but the Subordinate Judge in appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in.

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Held, that the Subordinate Judge in appeal had no power to make fresh order for payment by instalments varying the original order.

Held, also, that the judgment-creditor, by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments, did not bind himself to abide by that order.

BÁLKRISHNA INDRABHÁU *v.* A'BÁJI BIN BAHIRJI MORE ... 326

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SECS. 53 AND 54—*Special Judge—His powers in revision—Withdrawal of suit—Mistake in filing suit not a ground for withdrawal.*] A Special Judge appointed under section 54 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not competent, in the exercise of his revisional powers, to allow a plaintiff to withdraw his suit with liberty to bring a new one, merely on the ground that he has made some mistake in filing the suit.

MUKTÁJI BHÁGOJI *v.* MÁNÁJI 684

DOCUMENT—*Production of document—Civil Procedure Code (Act XIV of 1882), Sec.* 174—*Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Indian Penal Code (Act XLV of 1860), Sec.* 175—*Criminal Procedure Code (Act X of 1882), Sec.* 480.

See CIVIL PROCEDURE CODE 63

EUROPEAN BRITISH SUBJECT—*Criminal Procedure Code (Act X of 1882), Secs.* 4, *Cl.* (i), *and* 453 *and* 454—*Privilege—Waiver—High Court—Jurisdiction of High Court over European British subjects in Sind—Bombay Act XII of* 1866.] Where a European British subject waives his right to be dealt with as such by the Magistrate before whom he is tried, he thereby loses all the benefits of the special procedure provided for him under Chapter XXXIII of the Code of Criminal Procedure (Act X of 1882), including the right to have the proceedings in his case reviewed by a Presidency High Court, if another Court exercises the highest revisional jurisdiction under the Code in cases other than those against European British subjects in the place where he is tried.

The definition of "High Court" in section 4, clause (i), of the Code of Criminal Procedure (Act X of 1882) must be read with reference to the "special proceedings" against European British subjects contemplated in Chapter XXXIII, and not with reference to proceedings generally against Europeans, including proceedings in which they waive their rights under that chapter.

If, therefore, in any particular case, the special rules contained in Chapter XXXIII of the Code cease to have any application, the definition of "High Court" in the former part of section 4, clause (i), ceases also to have any application to such a case. The definition in the latter part of the section then prevails, and the case falls within the category of "other cases" to which that part of the section applies.

The accused, a European British subject, was tried before the City Magistrate of Karáchi and convicted of criminal breach of trust under section 409 of the Indian Penal Code, and sentenced to six months' simple imprisonment.

At the trial, he waived his right to be tried as a European British subject.

Held, that the accused was not subject to the revisional jurisdiction of the High Court. The accused not having been tried under

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the special procedure laid down for the trial of European British subjects, the Sadar Court in Sind, which, under Bombay Act XII of 1866, was the highest Court of appeal in all civil and criminal matters in Sind, had the revisional powers of a High Court in the present case by virtue of the latter part of section 4, clause (i), of the Code of Criminal Procedure.

QUEEN-EMPRESS *v.* J. GRANT 561

EVIDENCE—*Ancestral and self-acquired property—Burden of proof.*] The presumptions of the Hindu law apply to Khojá Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. Therefore in a suit for partition brought by a son against his father who alleged that the customs and usages of the Khoja community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's life-time a partition of the property in the father's hands, whether ancestral or self-acquired,

Held, that the burden of proving the issues framed upon these allegations lay upon the defendant.

In the same suit where the defendant having failed to establish the existence of the special custom and usages above mentioned, yet resisted the plaintiff's claim to partition on the ground that the property claimed was not ancestral,

Held, that the *onus* was on the plaintiff, in the first instance, to give evidence that the property was ancestral. In such cases the amount of evidence required to shift upon the defendant the burden of displacing it, depends on the circumstances of each case.

CASSUMBHOY AHMEDBHOY *v.* AHMEDBHOY HUBIBHOY AND RAHIMBHOY ALLA'DINBHOY 280

———— *Burden of proof—Suit by a claimant to property under attachment.*] The defendant having attached certain property as belonging to his judgment-debtor B., the plaintiff applied for the removal of the attachment, alleging that she had purchased the property from B. prior to the defendant's decree. Her application was rejected, and an order maintaining the attachment passed. The plaintiff thereupon brought the present suit to establish her right to the property in question. The Court of first instance dismissed the suit. The plaintiff appealed to the District Judge, who reversed the lower Court's decree, holding that it was incumbent on the defendant to show that the alleged transaction of sale was fictitious. On second appeal by the defendant to the High Court,

Held, that the District Judge was wrong in throwing the burden of proof on the defendant. The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugned that order by the present suit, to prove her case. For this purpose it was necessary for the plaintiff to prove the payment of the purchase-money, and that she had been in possession since the alleged sale.

GOVIND ATMÁRÁM *v.* SANTAI 270

———— *Evidence Act I of* 1872, *Sec.* 92, *Proviso I—Contract—Wagering contract—Bombay Act III of* 1865*—Oral evidence admissible to prove a contract to be a gaming transaction.*] In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, and that the contract was, therefore, void.

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Held, that oral evidence was admissible to prove the defence set up by the defendant.

ANUPCHAND HEMCHAND *v.* CHAMPSI UGERCHAND 585

EVIDENCE—*Hindu law—Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.*] Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character.

NÁNÁBHÁI GANPATRÁV DHAIRYAVÁN *v.* ACHRATBÁI ... 122

——————ACT I OF 1872, SECS. 65, CL. (*b*), AND 91—*Stamp Act I of* 1879, *Sec.* 34, *Prov. I—Suit on an unstamped promissory note.*] The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the stamp duty and the penalty, under section 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court,

Held per JARDINE, J., that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp.

Held per BIRDWOOD, J., that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under section 65, cl. (*b*) of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected.

DÁMODAR JAGANNÁTH *v.* ATMÁRÁM HÁBÁJI 443

——————SEC. 92—*Evidence—Oral agreement inconsistent with written documents.*] Ruttonji Nowroji prior to his death was a partner with defendants in the firm of Nowroji Cursetji & Co. He died on the 8th November, 1884. On the 9th November 1885, his executors passed a release to the defendants, which recited that Ruttonji's share in the firm and future business had ceased on his death; that the surviving partners had requested the executors to settle the account of their testator with the firm, and that after

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examining the books and taking accounts, &c., a balance of Rs. 8,305-11-0 was found due, on payment whereof the executors released the defendants from all claims in respect of the share and interest of Ruttonji, &c. On the 7th April, 1887, the executors assigned over to the plaintiff a one-anna share in the said firm, and the plaintiff, as assignee, brought this suit for a declaration of his right to the share and for an account. He alleged that there had been no accurate examination of the books at the time of the release; that the amount really due to the testator's estate by the firm had not been ascertained; and that it had been agreed on by the partners, at the time of the release, that, in addition to the sum therein mentioned, the executors, as representing the testator's estate, should receive a one-anna share in the partnership.

The defendants denied the right of the plaintiff, and contended that the interest of Ruttonji and his estate in the partnership ceased at his death. They relied on the release, and denied any agreement to give the executors a share; and contended that, under section 92 of the Evidence Act I of 1872, no evidence could be given of the alleged agreement. For the plaintiff it was contended that the agreement as to the one-anna share was quite independent of the release.

Held, that evidence of the agreement that the executors should continue to have a one-anna share in the partnership was inadmissible, as being inconsistent with the written release (Evidence Act, Sec. 92). By the release the executors of Ruttonji released the partners from all claims whatever in respect of Ruttonji's share, and the consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased and determined. The oral agreement added another term to the consideration for release in respect of the past accounts, *viz.* the continuance of a one-anna share in the partnership. Such an agreement was not a purely collateral or additional agreement. It was an addition to the terms of a contract that had been reduced to writing, and was inconsistent with those terms.

Held, also, on the evidence that it had not been proved that all the partners consented to the alleged new partnership, and that on this ground alone the plaintiff could not succeed in his suit.

COWASJI RUTTONJI LIMBOOWÁLLÁ *v.* BURJORJI RUSTOMJI LIMBOOWÁLLÁ 335

EVIDENCE ACT I OF 1872,—SEC. 132—*Protection given to answers which a witness is compelled to give—"Compelled to give"—Meaning of the words—Indian Oaths' Act (X of* 1873), *Sec.* 14.] Section 132 of the Evidence Act (I of 1872) makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, and which then he has been compelled by the Court to give.

Per BIRDWOOD, J., (dissenting):—Section 132 of the Evidence Act (I of 1872), read with section 14 of the Indian Oaths' Act (X of 1873), compels a witness to answer criminating questions, and he is protected by the proviso to section 132 from a criminal prosecution for any offence of which he criminates himself directly or indirectly by his answer, except a prosecution for giving false evidence by such answer. It is not only when a witness asks to be excused from

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answering a criminating question, and his request is refused, that he is "compelled to give" the answer within the meaning of the proviso. The compulsion is operative whether he asks to be excused or gives the answer without so asking.
QUEEN-EMPRESS v. GANU SONBÁ 440

EXECUTION—*Civil Procedure Code (Act XIV of 1882), Secs. 235, 295, 490—Application for execution, necessity of, in order to share in distribution under Section 295—Attachment before judgment, effect of—Decree—Decree-holder with an attachment before judgment must after decree apply for execution under Section 235 in order to share in distribution.*
See CIVIL PROCEDURE CODE 400

———————*Decree—Sale in execution—Certificate of sale—Confirmation of sale, effect of—Title of auction-purchaser without certificate of sale.*
See CERTIFICATE OF SALE 589

———————*Execution of decree—Limitation—Application for execution in accordance with law—Limitation Act XV of 1877, Sch. II, Art. 179—Decree against a minor—Application for execution against minor's mother personally, but not as his guardian.*
See DECREE 427

———————*Purchase—Notice—Joint family—Ancestral property—Hindu law—Alienations by father—Son's liability for father's debts—Limitation Act XV of 1877, Sec. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.*
See HINDU LAW 625

———————*Sale—Proclamation—Civil Procedure Code (Act XIV of 1882), Secs. 274 and 289—Property broken up into lots—Separate proclamations when necessary.*
See DECREE 368

EXECUTOR—*Hindu law—Will—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), Sec. 179—Probate and administration Act (V of 1881), Sec. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate—Parties to sue—Practice.*
See WILL 621

FISHERY—*Immoveable property—Right of fishery—Possession—Dispossession—Specific Relief Act I of 1877, Sec. 9—Practice—Civil Procedure Code (Act XIV of 1882), Secs. 30 and 632—Objection under Section 30 where suit is under Section 9 of Specific Relief Act.*] The plaintiffs were fishermen belonging to the village of N. They claimed in this suit for themselves and the other fishermen of their village the exclusive right of fishing in the Nágothna creek between high and low water mark, within certain limits set forth in the plaint, and, under section 9 of the Specific Relief Act I of 1877, they sought to recover possession of that right from the defendants, who, they alleged, had dispossessed them within six months before this suit was filed. The Subordinate Judge held that they had established their right, and made an order directing that possession should be restored to them. The defendant then applied to the High Court under its extraordinary jurisdiction, contending that the order made by the first Court was beyond its jurisdiction, the right of fishing not being immoveable property within the meaning of that section.

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Held, that the first Court did not act without jurisdiction, the right claimed coming within the denomination of immoveable property.

It was contended by the defendants that the plaintiffs, who claimed on behalf of other fishermen of the village, should have proceeded under section 30 of the Civil Procedure Code (Act XIV of 1882).

Held, that the objection was a good one; but, inasmuch as it was still open to the defendants to establish their right by a regular suit, the irregularity in the present suit was not such as to call for the exercise of the powers of the High Court under section 622 of the Civil Procedure Code.

BHUNDAL PA'NDA' *v.* PANDOL POS PA'TIL 221

GIFT—*Incomplete gift—Jurisdiction—Small Cause Court—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of* 1882, *Sec.* 18.] The plaintiff as executor of D. sued the defendant in the Small Cause Court of Bombay to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff, that, assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the notes.

Held, by the High Court, that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value.

KHURSEDJI RUSTOMJI COLA'H *v.* PESTONJI COWASJI BUCHA' ... 573

HINDU LAW—*Adoption by an unmarried man.*] Adoption by an unmarried man is not invalid.

GOPA'L ANANT *v.* NA'RA'YAN GANESH 329

————————*Adoption during wife's pregnancy—Posthumous son, rights of, in family property—Will limiting legal share of such son.*] The adoption of a son by a childless Hindu is valid, although at the time of adoption his wife is pregnant. The possibility that a son may afterwards be born to him does not invalidate the adoption.

A posthumous son takes the family property by right of survivorship, on the principle of relation back to the time of the father's death which applies in the analogous case of inheritance and partition, and the rights of such a son stand on the same footing as those of a son *in esse* at the time of the father's death. A father, therefore, can no more interfere by his will with the right of a posthumous son to his share of the family property as fixed by law, than with the right of a son *in esse* at the time of his death. An adopted son stands in the position of a natural son, subject to having his share reduced to one-fourth in the event of a natural son being subsequently born.

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R. died, leaving him surviving his widow, who was then pregnant, and the defendant whom he had adopted a few days before his death. By his will, R. directed that, in the event of a son being born to him after his death, his property should be divided equally between such son and the defendant, but otherwise all his property was to go to the defendant. Shortly after R.'s death a son (the plaintiff) was born. The present suit was brought by the guardian of the plaintiff to recover the family property from the defendant. It was contended that the adoption of the defendant was invalid, having taken place during the pregnancy of the plaintiff's mother, and that R.'s will, in so far as it was in prejudice of the plaintiff's rights as a son, was also invalid.

Held, that the adoption of the defendant by R. was valid, notwithstanding that R.'s wife was pregnant at the time of the adoption.

Held, also, that R.'s will was inoperative in so far as it reduced the plaintiff's share to a moiety of the property. On the birth of the plaintiff the defendant, as the adopted son, became by Hindu law entitled only to one-fourth, the plaintiff, as the natural son, taking the other three-fourths.

HANMANT RÁMCHANDRA *v.* BHIMÁCHÁRYA 105

HINDU LAW—*Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.*] Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character.

Pándurang Mánkoji, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife Párvati and his three minor sons, Vithobá, Govind, and Ganpatráv, and directed as follows:—"In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property and divide the whole among such sons, or the survivors of them." Subsequently to the testator's death, his widow Párvati managed his estate, and probate of his will was granted to her alone in January, 1832. In 1836 she bought the V. property for Rs. 2,801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "Párvati, widow and administratrix of the late Pándurang Mánkoji, her heirs, executors, administrators, and assigns." In 1845 the eldest son Vithoba separated from the family, and gave a release to his mother Párvati. In 1854 she purchased the P. property for Rs. 8,452, the conveyance being to "Párvati, her heirs, executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of Pándurang Mánkoji, deceased." In the same year, *viz.* 1854, the second son Govind separated, and gave Párvati a release. The third son Ganpatráv (the third defendant) continued to live with his mother Párvati until 1871, in which year she died intestate. Ganpatráv then entered into possession of all the property which she had or managed in her life-time, including the V. and P. properties. In 1879 he mortgaged these properties to the first two defendants for Rs. 12,500. His sons (the plaintiffs) now alleged those pro-

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perties to be ancestral, and complained that he and the mortgagees were acting in collusion; that he had charged the properties unnecessarily; and that he and the mortgagees were about to sell them at an undervalue for the purpose of defeating their (the plaintiffs') rights. They, therefore, filed this suit, and prayed *(inter alia)* that the claims of the mortgagees, after being ascertained, might be paid off. The defendants denied that the properties in question were ancestral property in the hands of Ganpatráv (the third defendant) or that the plaintiffs, as his sons, had any interest therein.

Held, that the interest which the third defendant Ganpatráv derived from his mother Párvati in the mortgaged premises was ancestral property, in respect of which the plaintiffs had no present right of interference.

The Court ordered that on payment of the mortgage-debt the properties should be re-conveyed to the third defendant, and, in the event of their being sold, that the whole of the surplus proceeds should be paid to him.

The original property was to be regarded, as in 1831, the self-acquired property of Pándurang Mánkoji, and as having passed under his will. In the absence of any evidence with regard to it, there was no presumption as to its character; and the plaintiffs, who alleged it to be ancestral, were bound to prove that fact.

On Pándurang Mánkoji's death, his sons, Vithobá, Govind, and Ganpat (third defendant), took whatever they became entitled to, under their father's will, as their self-acquired property, but in coparcenary according to Hindu law, and not as joint tenants according to English law. As to Párvati, she took, under the will, an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they might claim their shares. On the sons claiming their shares, one share would be left with Párvati, and that share, subject to her incapacity as a Hindu widow to deal with immoveable property given her by her husband, would then become hers absolutely.

Vithobá and Govind having separated, Párvati and Ganpatráv (third defendant), continued to treat themselves as a joint family, and when Párvati died in 1871, her share in the joint property lapsed for the benefit of Ganpatráv. That share, whether he took it by inheritance or by survivorship, having originally formed part of his father's estate, became ancestral in his hands.

NÁNÁBHÁI GANPATRÁV DHAIRYAVÁN *v.* ACHRATBÁI ... 122

HINDU LAW—*Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act (XV of 1877), Sec. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.*] Where a Hindu governed by the Mitákshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at court-sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are:—

(1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family?

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(2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and

(3) Had the purchaser notice that the debts were so contracted?

The plaintiff sued in 1883 for partition of ancestral property, consisting *(inter alia)* of certain *thikâns* which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution proceedings. In the certificates of sales granted to the different purchasers, the property sold was described as being a four-annas' share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title and interest in the above-mentioned property of the said Râvji (*i. e.* the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thikâns* in question was never disturbed, though the sharers had each a separate possession of distinct portions of the ancestral property.

Held, that under the circumstances the father's interest alone passed to the auction-purchasers.

Held, further, that the plaintiff's claim with regard to eight other *thikâns* in dispute was time-barred. On the sale of those *thikâns* in execution of decrees against his father, the plaintiff intervened, and obstructed the auction-purchasers in obtaining possession. His obstruction was, however, removed by an order of the Court, dated 23rd October, 1873. The present suit, which was filed in 1883, not having been brought within one year from the date of that order as required by the law then in force, the claim was clearly time-barred. The plaintiff was not entitled to a deduction of the time taken up in prosecuting a former suit, which was filed up in 1872 and disposed of in 1883: as that suit did not fail for want of jurisdiction or any defect of a like nature such as is contemplated by section 14 of the Limitation Act XV of 1887, but was withdrawn by the plaintiff himself for want of parties, with liberty to bring a fresh suit. Section 374 of the Code of Civil Procedure (Act XIV of 1882), therefore, applied to the present case.

KRISHNÂJI LAKSHMAN *v.* VITHAL RÂVJI RENGE 625

HINDU LAW—*Joint family—Manager—Parties to suit—Practice—Suit by manager alone—Co-parceners made parties on objection by defendant—Civil Procedure Code (Act XIV of* 1882), *Sec.* 30—*Amendment of pleadings—Plaint amended in second appeal by adding parties.*] The plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle, who were his undivided co-parceners, should be made parties to the suit. The Court of first instance held that the plaintiff, as manager, could sue alone, and passed a decree for the plaintiff. The first Appellate Court reversed the decree, holding that the plaintiff could not sue alone, except under the provisions of section 30 of the Civil Procedure Code, which had not been complied with. On second appeal to the High Court,

Held, that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co-plaintiffs or as defendants. The right of a plaintiff to assume the character of

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manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, and, therefore, the defendant is always entitled in such suits, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record, to ensure him against the possibility of the plaintiff's acting without authority.

The plaintiff was allowed on second appeal to amend his plaint by making the other members of the family parties to the suit.

HARI GOPÁL *v.* GOKALDÁS KUSHABÁSHET 158

HINDU LAW—*Joint family—Money decree—Decree against father alone—Purchaser at execution sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution proceedings.*] In the case of a joint Hindu family whose family property is sold by the father alone by private conveyance, or where it is sold in execution of a decree obtained against him alone, the mode of determining whether the entire property or only his interest in it passes by the sale, is to inquire what the parties contracted about in the case of a conveyance, or what the purchaser had reason to think was buying if there was no conveyance, but only a sale in execution of a money decree.

In the case of an execution sale the mere fact that the decree was a mere money decree against the father as distinguished from one passed in a suit for the realization of a mortgage security directing the property to be sold, is not a complete test.

The plaintiff claimed certain property from the defendant, alleging that he had purchased it from a third person, who had purchased it at an auction sale held in execution of a money decree obtained against the first defendant alone. The first defendant was the father of the remaining defendants, and they constituted a joint Hindu family. The sons contended that only the father's interest was bound by the sale; and the lower Courts decided in their favour.

In appeal, the High Court reversed the decree, and sent back the case for a fresh decision, on the ground that the lower Courts had decided the question in the case exclusively on the ground that the property had been purchased in execution of a money decree without referring to the execution proceedings.

KAGAL GÁNPAYA *v.* MANJÁPPÁ 691

———*Joint family—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs—Practice—Amendment of plaint.*] The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father.

In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question.

Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father, on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of first instance found that the

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debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court,

Held, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of binding for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable.

Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion.

At the hearing of the appeal it was alleged that the plaintiffs had separated from their father before the mortgage decree was passed against him, and an application was made on their behalf that the plaint in this case should be amended by inserting an allegation to that effect.

Held, that the amendment could not be allowed. Such an amendment would entirely alter the points of contention between the parties. In suing in the form adopted by the plaintiffs they doubtless intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property altogether from the liability, on the ground that the debt was immoral, and that the estate could not, therefore, be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, they could not now ask the Court to put their suit on a new footing.

NÁRA'YANRÁV DÁMODAR *v.* JAVHERVAHU 431

HINDU LAW—*Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—Limitation for such suit—Act XV of* 1877, *Sec.* 7 *and Art.* 12—*Family debt binding on minor son—Minor—Guardian—Representative of minor in a suit against him—Certificate—Act XX of* 1864.] In 1862 Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji. In 1863, Rájkaran died, leaving a widow, Shivbá, and two sons, *viz.* Amrá, and Parbhu, a minor. In 1866, Amrá and Shivbá, the latter of whom acted for her self and as guardian of her minor son Parbhu, settled the account with Bezanji, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 Amra died. In 1869 Bezanji's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against Shivbá both as guardian of the minor Parbhu and also against her in her individual capacity. At the Court sale held in execution of this decree, Dáji purchased the property in dispute in 1870.

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In 1881 Parbhu filed the present suit to recover possession of the property, alleging that Dáji's purchase was invalid as against him, he having been a minor at the time of the Court sale. He subsequently assigned his interest to the respondent (second plaintiff). It was contended on behalf of the defendant Dáji, that the suit, not having been brought within one year after Parbhu had attained majority, was barred by limitation under Article 12, Schedule II, of Act XV of 1877.

Held, that the suit was not barred by limitation. Parbhu had not been properly represented by Shivbá in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX of 1864) Parbhu was, therefore, not bound by the decree in that suit or by the sale in execution, and Article 12, Schedule II, of Act XV of 1877 did not apply

Held, also, upon the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was, therefore, not entitled to disturb the execution-purchaser.

DÁJI HIMAT *v.* DHIRAJRÁM SADÁRÁM 18

HINDU LAW—*Maintenance—Incontinence of a co-parcener's concubine disentitling her to maintenance.*] Continued continence is, under the Hindu law, a condition precedent to a deceased co-parcener's concubine claiming maintenance.

YASHVANTRÁV *v.* KÁSHIBÁI 26

———————*Marriage—Custody—Guardianship—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter in marriage without his consent.*] The plaintiff and Ramábái, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was Ramábái's father, until the year 1880. In 1877 a daughter Sonábái had been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his own father's house, where in 1884 he requested his wife Ramábái to join him with their daughter Sonábái. Ramábái refused, and she and Sonábái continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, Sonábái having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter Sonábái from the defendants, who, however, refused to deliver the girl to the plaintiff. In May, 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter Sonábái married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a *rule nisi* for an injunction against the defendants

Held, that, pending the hearing of this suit, he was entitled to the injunction asked for.

NÁNÁBHÁI GANPATRÁV DHAIRYAVÁN *v.* JANÁRDHAN VÁSUDEV AND RAMÁBÁI 110

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HINDU LAW—*Marriage—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with his authority.*] The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts in order to give effect to this authority, may not improperly be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty the Court may interfere even in the case of a father.

One Girdhar died, leaving a widow and an infant daughter named Bani. After Girdhar's death, his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parents' house. There she died about eighteen months after Girdhar's death. The orphan Bani was then brought up by her maternal uncles, Shridhar and Goverdhan.

When Bani became ten or eleven years old, her paternal uncle Hirálál and paternal grandmother Rakhmibái sought, under Act IX of 1861, to take possession of the minor Bani from the custody of her maternal uncles. This application was resisted by Shridhar and Goverdhan, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhátiá in Bombay for a large sum of money.

The Court found that several Bhátiá girls of Dharangaon, where the parties resided, had of late been married to old Bhátiás in Bombay, the girls' relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court.

Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizápur, a town in the Nizám's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioners' custody a month before the day fixed for the marriage. Against this order Shridhar and Goverdhan appealed to the High Court.

Held, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they had never taken care of the girl, it was necessary, in the interests of the minor, to put them upon terms to prevent the possibility of their abusing their authority, to the minor's prejudice.

Held, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Courts in British India.

Held, also, that the girl ought not to be forced into marrying a person whom she did not like.

SHRIDHAR *v.* HIRÁLÁL VITHAL 480

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HINDU LAW—*Property dedicated to idol—Trustee—Primogeniture—Takait Mahárâj, office of—Deposition from office by Sovereign Prince—Effect of order of deposition—Jurisdiction.*] By the custom of primogeniture obtaining in his family, the plaintiff succeeded to the office of Takait Mahárâj and came into possession of all the property dedicated to the family idol of Shri Náthji. He resided at Nathdwár within the territories of the Ráná of Udepur in Mewár. Part of the dedicated property was at Poona. The first four defendants managed this portion of the property for the plaintiff. They collected the rents and transmitted them to him from time to time. In 1876 the Ráná deposed the plaintiff for alleged misconduct, deported him from his territories, and proclaimed the plaintiff's son (defendant No. 5) as Takait Mahárâj. The defendant having refused to pay over the rents and to deliver the Poona property to the plaintiff, the plaintiff brought the present suit to recover possession. The plaintiff's son was made a co-defendant on his own application. The defendants denied the plaintiff's right to the property, on the ground that he had been deposed and banished by the Ráná, and the fifth defendant (the plaintiff's son) claimed to be Takait Mahárâj, and as such to be entitled to all the devasthán property. The lower Court made a decree in favour of the plaintiff. On appeal by the defendants to the High Court,

Held, that the plaintiff was entitled to the property in dispute. The order of the Ráná could not be regarded as a foreign judgment between the parties. That order, whatever its effect might be within the territories of the Ráná, could not affect the property situated in Poona beyond his jurisdiction. It had descended to the plaintiff on the death of his father in virtue of the custom of primogeniture obtaining in his family. Whether he took it as owner or as trustee for the idol and shrine was immaterial, for in either case he had a right to possession. If he took it as owner he had not in law lost his right as such in consequence of the Ráná's act. If he held merely as a trustee he had not yet been removed from his office by any competent tribunal.

NÁNÁBHÁI *v.* SHRIMAN GOSWÁMI GIRDHARIJI 331

———*Stridhan—Mayukha—Inheritance—Property given to a woman by a stranger—Devolution of such property—Daughter's daughters not entitled to it—Son's widow preferred as gotrájá sapinda.*] By the law of inheritance laid down in the Mayukha a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter.

BÁI NARMADA *v.* BHAGWANTRÁI 505

———*Will—Adoption—Adoption directed to be made, not by testator's widow but by the widow of his deceased son—Such adoption is an adoption, not to testator himself, but to his deceased son—Adoption of testator's nephew directed by will—Bequest of property to such nephew—Adoption a condition precedent to his taking the property under the will—Persona designata—Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.*

See ADOPTION 185, 202

———*Will—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), Sec. 179—Probate and Administration Act (V of 1881), Sec. 4—Hindu will made outside Bombay relating to*

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property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate—Parties to sue—Practice.] One Lálbhái died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in the Surat District. He left a widow, Bái Harkor, and a minor son, Magan-bhái. At his death he made a will bequeathing his property to his son, and appointing certain executors to manage the property during the son's minority. The son died in 1887, leaving a minor widow, Magangauri. In 1879 one of the executors obtained probate of Lálbhái's will from the High Court.

In 1884 a suit was filed, on behalf of the minor Magangauri, against her mother-in-law, Bái Harkor, to recover possession of the property covered by the will of Lálbhái.

One of the defences to this suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor.

Held, that the executor was not a necessary party to the suit. Section 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property. On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff, in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), sec. 4, (if that Act can be held to operate at all in the Mofussil before a notification is issued under section 2), the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation.

BÁI HARKOR v. MÁNEKLÁL RASIKDÁS... 621

IDOL—*Offerings made to an idol—Liability of persons in possession of an idol's property—Charity—Public charity—Trust—Public charitable or religious trust—Account—Jurisdiction of Civil Courts in cases relating to public charities—Right to sue—Civil Procedure Code (Act X of 1877), Sec. 539—"Direct interest," meaning of—Practice—Application to put in evidence in appeal which applicant refused to produce at first hearing.*] 1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of section 539 of the Code of Civil Procedure (Act X of 1877).

2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law.

3. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consist of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a

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remedy may be sought against them for mal-administration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*.

The plaintiffs, as relators, filed this suit, under section 539 of the Code of Civil Procedure (Act X of 1877), against the defendants as trustees of the temple of Shri Ranchhod Rájji at Dákor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dákor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *shevaks* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. They remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhandár* or store-room.

The god Shri Ranchhod Rájji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity, of cash, ornaments, clothes, and other articles, amounting in value to about a lákh of rupees in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *inám* villages, of which Dákor and Kanjri yielded the largest income.

The plaintiffs sued as persons interested in the maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income of the temple had largely increased, and had been wrongly appropriated by the defendants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management.

The defendants answered *(inter alia)* that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under section 539 of Act X of 1877; that they themselves were owners of the idol and of the idol's property, and that, as such, they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past.

The District Judge dismissed the suit, on the preliminary ground that, except the first plaintiff, who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under section 539 of the Code of Civil Procedure (Act X of 1877).

Held, reversing the decision of the District Judge, that plaintiffs Nos. 2—5, as priests residing at Dákor and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees, they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance.

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Held, further, that the *shevaks* were not the owners of the offerings made to the idol. As recipients of those offerings, they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management.

The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it.

The jurisdiction of the Civil Courts in matters of this kind discussed.

The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of Appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce.

Held, that the evidence could not be admitted.

MANOHAR GANESH TÁMBEKAR *v.* LAKHMIRÁM GOVINDRÁM ... 247

IDOL—*Property dedicated to idol—Trustee—Primogeniture—Takait Mahárâj, office of—Deposition from office by Sovereign Prince—Effect of order of deposition—Jurisdiction.*] By the custom of primogeniture obtaining in his family, the plaintiff succeeded to the office of Takait Mahárâj, and came into possession of all the property dedicated to the family idol of Shri Náthji. He resided at Náthdwár within the territories of the Ráná of Udepur in Mewár. Part of the dedicated property was at Poona. The first four defendants managed this portion of the property for the plaintiff. They collected the rents and transmitted them to him from time to time. In 1876 the Ráná deposed the plaintiff for alleged misconduct, deported him from his territories, and proclaimed the plaintiff's son (defendant No. 5) as Takait Mahárâj. The defendant having refused to pay over the rents and to deliver the Poona property to the plaintiff, the plaintiff brought the present suit to recover possession. The plaintiff's son was made a co-defendant on his own application. The defendants denied the plaintiff's right to the property, on the ground that he had been deposed and banished by the Ráná, and the fifth defendant (the plaintiff's son) claimed to be Takait Mahárâj, and as such to be entitled to all the devasthán property. The lower Court made a decree in favour of the plaintiff. On appeal by the defendants to the High Court,

Held, that the plaintiff was entitled to the property in dispute. The order of the Ráná could not be regarded as a foreign judgment between the parties. That order, whatever its effect might be within the territories of the Ráná, could not affect the property situated in Poona beyond his jurisdiction. It had descended to the plaintiff on the death of his father in virtue of the custom of primogeniture obtaining in his family. Whether he took it as owner or as trustee for the idol and shrine was immaterial, for in either case

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he had a right to possession. If he took it as owner he had not in law lost his right as such in consequence of the Rána's act. If he held merely as a trustee he had not yet been removed from his office by any competent tribunal.

NÁNÁBHÁI *v.* SHRIMAN GOSWÁMI GIRDHARIJI 331

INHERITANCE—*Stridhan—Hindu law—Mayukha—Property given to a woman by a stranger—Devolution of such property—Daughter's daughters not entitled to it—Son's widow preferred as gotrája sapinda.*] By the law of inheritance laid down in the Mayukha a house given to a married woman by a stranger to the family and her own earnings devolve on her death as if she had been a male. The daughter-in-law of the deceased owner succeeds, therefore, in preference to the daughters of a deceased daughter.

BÁI NARMÁDA *v.* BHAGWANTBÁI 505

INSOLVENCY—*Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 354, 355, *and* 356—*Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.*] By an order dated the 9th July, 1879, A. was declared an insolvent under section 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it.

Held, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under section 354, he under section 356 was directed to convert it into money. G., therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G.'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done.

The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with section 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.

SHRIDHAR NA'RA'YAN *v.* KRISHNA'JI VITHOJI 272

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INSOLVENCY—*Indian Insolvent Act* (*Stat.* 11 *and* 12 *Vic., C.* 12)—*Expunging names of creditors from schedule—Official Assignee a trustee for creditors admitted in schedule.*] The applicant was a creditor of the insolvents, who filed their schedule in Bombay in July, 1868. The schedule contained the names of twenty-six creditors, twenty of whom were residents in Karáchi and six in Multán. The debts amounted, in the aggregate, to Rs. 51,819-13-0, and were all admitted, some of them being of trifling sums. The applicant was the largest creditor on the schedule, his debt amounting to Rs. 27,500. The insolvents obtained their personal discharge in March, 1869. Since the date of the insolvency one dividend had been declared, *viz.* a dividend of one per cent., in 1870. Only one creditor had applied for and received that dividend. On the 15th July, 1886, the applicant for the first time applied for a dividend on his claim. He was then, after so long a time, unable to adduce any proof in his own possession, in support of his claim, but was ultimately allowed by the Official Assignee to prove his claim from the insolvent's books. Having thus proved his claim against the estate, the applicant obtained a rule on the 5th October, 1887, calling on the other creditors of the insolvents to show cause why they should not come in and prove their claims, or, in default, why their names should not be expunged from the insolvents' schedule.

Held, discharging the rule, that the Court had no power to expunge the name of a creditor where no fraud was proved or alleged in regard to their claims.

The Official Assignee holds the assets of an insolvent as a trustee for all the creditors admitted on the insolvent's schedule, whether or not they have actually proved their claims.

IN *RE* DEWOURN JEWRÁJ AND HEERJEE DEWOURN 342

———*Insolvent debtor—Unfair preference—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 351.] A creditor can put pressure on his debtor to get payment of his claim, notwithstanding that the debtor may be in embarrassed circumstances. But a debtor, who gives an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the *aliquot* share of the other creditors, acts fraudulently, and no title is given to that particular creditor as against the assignees who represents the creditors generally.

A. filed a suit and obtained a decree against B. During the pendency of the suit, and only four days before the decree was passed, B. assigned by way of mortgage nearly the whole of his property to one of his creditors C. The assignment was made, not to secure a fresh advance, but in consideration of past debts due to C. C. was aware of B.'s embarrassments. Two years afterwards B. was arrested in execution of A.'s decree. B. thereupon applied to be declared an insolvent.

Held, that the assignment by B. of nearly the whole of his property to C. amounted, under the circumstances, to an unfair preference, within the meaning of section 351, clause (*c*) of the Code of Civil Procedure (XIV) of 1882). B. was, therefore, not entitled to be declared an insolvent.

DÁDÁPÁ *v.* VISHNUDÁS 324

INSTALMENTS—*Penalty—Bond—Stipulation to pay double the amount of debt on default of payment of any instalment.*] A stipulation by which, on default of payment of one instalment, double the entire

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amount of the debt due under an instalment bond was to become at once payable, *held* to be in the nature of a penalty.
(JOSHI KA'LIDA'S *v.* DA'D'A ABHEANG 555

INSTALMENTS, DECREE PAYABLE BY—*Decree—Dekkhan Agriculturists' Relief Acts (XVII of 1879), Sec. 20, and Act XXII of 1882, Sec. 15B.—Payment of decree by instalments—Default—Whole sum payable on default—No second order for instalments—Acquiescence—Effect of taking out of Court instalments paid in under second order.*] Section 15B of the Dekkhan Agriculturists' Relief Act (XXII of 1882) allows the Court to order payment of a decree by instalments either in its decree or in the course of the execution. But it does not authorize a variation of any order once so made. Nor does section 20 of Act XVII of 1879 authorise a series of instalment orders each one varying from the preceding.

A decree was made payable by instalments, with a proviso that in default of payment of any one instalment, the whole amount remaining due should be recoverable at once. The judgment-debtor made default Thereupon the decree-holder sought to recover the whole amount of the decree. The judgment-debtor then applied for a fresh order for payment by instalments. The Court of first instance refused, but the Subordinate Judge in appeal granted the application. The judgment-debtor paid into Court the amount of instalments which had become due under the second order. The decree-holder took out the money so paid in.

Held, that the Subordinate Judge in appeal had no power to make a fresh order for payment by instalments varying the original order.

Held, also, that the judgment-creditor by taking out the money paid into Court by the judgment-debtor as instalments due under the second order for instalments did not bind himself to abide by that order.
BA'LKRISHNA INDRABHA'U *v.* A'BA'JI BIN BAHIRJI MORE 326

JOINT FAMILY—*Hindu law—Ancestral property—Alienation by father—Son's liability for father's debts—Execution—Purchaser—Notice—Limitation Act XV of 1877, Sec. 14—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.*
See HINDU LAW 625

———*Hindu law—Money-decree—Decree against father alone—Purchaser at execution sale under such decree—How far such sale binding on the interest of the sons not parties to the suit or execution proceedings.*
See HINDU LAW 691

———*Hindu law—Mortgage by a father—Decree against father on mortgage giving possession with interest and costs—Son's liability to satisfy the decree as to interest and costs—Practice—Amendment of plaint.*] The plaintiff's father mortgaged certain ancestral property for a limited term. A suit was brought on the mortgage against the father, and a decree was passed, directing the mortgaged property to be handed over to the mortgagee for a certain time, and awarding payment of interest and costs by the father.

In execution of this decree, the mortgagee sought to recover the costs by sale of the property in question.

Thereupon the plaintiffs sued for a declaration that the property was not liable to be sold in execution of the decree against the father,

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on the ground that the debts contracted by the father were for immoral purposes, and that, therefore, the estate could not be bound by the decree at all. The Court of first instance found that the debts had not been incurred for any immoral purpose, and dismissed the suit. On appeal to the High Court,

Held, that under the decree passed against the father the interest and costs became a debt upon the whole estate, from which it could not escape, unless it was clearly made out that the debt was the result of fraud or immorality. Although the father alone was primarily liable for the fulfilment of the decree, still the debt was one which was rightly chargeable to the whole estate, and the sons would be liable, just as they would have been liable if the father had compromised the suit, unless the transaction were tainted with fraud or immorality. In a united family the father is capable of acting as the representative of the family, except in the case of borrowing for fraudulent or immoral purposes. In this case he entered into litigation, which resulted in loss to himself and the family which he represented, and he could make the family responsible for any loss so incurred. The judgment-creditor could also make them liable.

Although where the father desires to represent the whole estate he can do so, yet he is not necessarily bound to do so, nor is the whole estate liable where he explicitly or impliedly binds only his own portion.

At the hearing of the appeal it was alleged that the plaintiffs had separated from their father before the mortgage decree was passed against him, and an application was made on their behalf that the plaint in this case should be amended by inserting an allegation to that effect.

Held, that the amendment could not be allowed. Such an amendment would entirely alter the points of contention between the parties. In suing in the form adopted by the plaintiffs they doubtless intended to take the chance of getting a greater advantage than they would have obtained if they had sued merely as separated sons. They sought to liberate the property altogether from the liability, on the ground that the debt was immoral, and that the estate could not, therefore, be bound by the decree at all. That being so, and the plaintiffs having omitted to allege partition, they could not now ask the Court to put their suit on a new footing.

NÁRÁYANRÁV DÁMODAR *v.* JAVHERVAHU 431

JOINT FAMILY—*Hindu law—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—Limitation for such suit—Act XV of* 1877, *Sec.* 7 *and Art.* 12—*Family debt binding on minor son—Minor—Guardian—Representative of minor in a suit against him—Certificate—Act XX of* 1864.

See HINDU LAW 18

JURISDICTION—*Act XIV of* 1869, *Secs.* 23 *and* 24—*Subordinate Judge appointed to assist another Subordinate Judge, powers of—Second appeal, objection to jurisdiction on—Practice.*] Where a Subordinate Judge is deputed, under section 23 of Act XIV of 1869, to assist another Subordinate Judge, the assistance by the Judge so deputed can only be afforded within the limits of his jurisdiction as fixed by section 24 of the Act, and cannot be invoked, except in matters within his competence.

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The plaintiff having obtained a decree against the defendant in a suit in which the subject-matter of the suit and the amount of the decree exceeded Rs. 5,000 in the Court of a Subordinate Judge of the First Class, presented it in that Court for execution. The Subordinate Judge transferred it for execution to the Second Class Subordinate Judge who had been appointed, under Act XIV of 1869, to assist him, and whose jurisdiction extended to Rs. 5,000 only. The Second Class Subordinate Judge ordered execution to issue. The defendant appealed, and this order was reversed. The plaintiff appealed to the High Court, and raised, for the first time, an objection that the Second Class Subordinate Judge had no jurisdiction to entertain the application for execution. The defendant contended that this objection was taken too late on second appeal.

Held, that the Second Class Subordinate Judge had no jurisdiction to entertain and deal with the plaintiff's application for execution, and that the plaintiff's objection should be allowed. An objection to the jurisdiction, the validity of which is patent on the face of the proceedings, can be taken at any stage of the proceedings.

SHRI SIDHESHWAR PANDIT *v.* SHRI HARIHAR PANDIT ... 159

JURISDICTION—*Appeal—Suit cognizable by a Court of Small Causes—Act XI of* 1865, *Secs.* 2, 6, 12, 21—*Act XIV of* 1869, *Sec.* 28—*Subordinate Judge invested with small cause powers—Final decision.*] The plaintiff sued to recover Rs. 5 as damages for the wrongful removal of a tree. The suit was filed in the Court of a Second Class Subordinate Judge, who was invested, under Act XIV of 1869, section 28, with the jurisdiction of a Judge of a Court of Small Causes.

The case, which was in itself of the nature of a small cause, was, however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree, and awarded the claim.

Held, that the suit having really been a small cause, no appeal lay to the District Court, though the Subordinate Judge did not use the procedure of Act XI of 1865. Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time.

A suit taken cognizance of under sections 2, 6 or 12 of the Mofussil Small Cause Court Act (XI of 1865), does not cease to be a suit tried under the Act, because of some divergence from its summary procedure. A surplusage of form and elaborateness does not change the character of the decision for the purpose of its finality.

Section 28 of the Bombay Civil Courts' Act (XIV of 1869) does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts; but still it creates an additional and distinct jurisdiction.

Since Act IX of 1887 came into force the Court is to be regarded as two Courts in such cases.

PITÁMBER VAJIRSHET *v.* DHONDU NAVLÁPÁ 48

———————*Bombay Act III of* 1874—*Vatandár kulkarni and rayat—Perquisites, right to.*] Bombay Act III of 1874 does not deprive the Civil Court of its jurisdiction to try the question whether a *vatandár kulkarni* is entitled to receive perquisites from his *rayat*.

VISHNU HARI KULKARNI *v.* GANU TRIMBAK 278

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JURISDICTION—*Caste question—Secession from a caste—Property purchased by seceding section during period of secession—Reunion of section with the caste—Suit by caste to recover from a seceding member property purchased by seceding section.*] The plaintiff and the defendant belonged to the caste of Visnagar Brâhmans, which in 1841 divided into two sections, known as the big and little sections. While this division continued;. *viz.* in the year 1868, certain lands were purchased by the small section in the names of the plaintiff, the defendant, and three other persons. In 1873 the members of the small section, with the exception of the defendant, reunited with the other members of the caste. The lands, however, remained in the possession of the defendant. The plaintiff, on behalf of the caste, brought this suit to recover the lands from the defendant. Both the lower Courts held that the case was not cognizable by the Civil Courts, as it involved a caste question. On appeal by the plaintiff,

The High Court reversed the decree of the Courts below, and sent back the case for re-trial. The lands in question had been admittedly purchased out of their own funds and for their own purposes by the members of the caste who had seceded; and the question, as to whom those lands now belonged, being one between the caste and one of the seceding members who had purchased them, could not be a caste question, unless the small seceding section itself could be regarded (and it was not so contended) as a separate and distinct caste. Under these circumstances it was for the Civil Court alone to determine who was entitled to the property, although it might be incidentally necessary for that purpose to enquire into the usage and practice (if any) of caste sections, situated as the seceding section of this caste had been, with respect to the property in question. If the lands had been originally the property of the caste, the question would have been between the caste and a section of it, and would have been a caste question, and not cognizable by the Civil Court.

MEHTÁ JETHÁLÁL *v.* JAMIATRÁM LALUBHÁI 225

———*Civil Court's jurisdiction over suits in respect of an injury caused by exclusion from an hereditary office—Bombay Hereditary Offices' Act (III of 1874), Sec. 40—Election of an officiator—Free election—Agreement in restraint of free election—Act X of 1876, Sec. 4—Its application to suits between private persons.*] The plaintiff and his co-sharers in a *kulkarni vatan* entered into an agreement in 1869 for the performance of the duties of the *vatan* by the several sharers in turn. The agreement provided that if any of the sharers prevented the nomination of a sharer to officiate in his turn, he should pay Rs. 100 as damages to the person thus excluded from office. The plaintiff alleged that in 1883 it was his turn to officiate, that the defendants, instead of electing him in accordance with the agreement, nominated another person, who was confirmed in the appointment by the Collector. The plaintiff, therefore, sued the defendants to recover Rs. 100 as damages for breach of the agreement of 1869.

Held, that the agreement could not be enforced by a civil suit, as it was opposed to the policy of section 40 of Bombay Act III of 1874, which contemplates a free election of an officiator by the whole body of registered representative *vatandárs* to whom the Collector issues his notice—an election unfettered by any promises made beforehand by any of the sharers.

Held, also, that a suit in respect of any injury caused by exclusion from office or service is barred by the second paragraph of clause (*a*)

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of section 4 of Act X of 1876 Having regard to the wording of the several clauses of section 4, the bar therein provided is not limited to suits against Government

NÁRO PÁNDURANG v MAHÁDEV PURSHOTAM ... 614

JURISDICTION—*Civil Procedure Code (Act XIV of* 1882), *Sec* 15] The plaintiff, who was a money lender, residing within the limits of the Ahmedabad Cantonment, sued the defendants, who resided within the jurisdiction of the City Small Cause Court at the same place, upon a bond executed by them at the cantonment He presented his plaint to the Cantonment Magistrate, whose pecuniary jurisdiction extended to Rs 200 only, but that officer, being of opinion that the suit was cognizable by the City Small Cause Court, returned it to the plaintiff, who subsequently presented it to the Judge of the City Small Cause Court, whose pecuniary jurisdiction extended to Rs 500 On reference by him to the High Court,

Held, that both the Courts had jurisdiction to try the suit, but that the Court of the Cantonment Magistrate was to be regarded as the Court of lower grade, and, therefore, under section 15 of the Civil Procedure Code (Act XIV of 1882), was the proper Court to try the suit.

MOHANLÁL RÁICHAND v VIRÁ PUNJÁ 169

———*Civil Procedure Code (Act XIV of* 1882), *Sec* 622—*Limitation—High Court's revisional powers—Material irregularity*] On the 29th November, 1886, this suit was filed on a bond dated the 29th November, 1881, payable in two years

The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 20th November, 1883

Against this decision the plaintiff applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882)

Held, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November, 1883,—that is, the day of the month corresponding with the day on which the bond was dated.

Held, further, that the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal, and where no appeal is permissible there is no remedy under section 622 of the Code or under the provisions of section 15 of Statute 24 & 25 Vic, c 104, whatever remedy there may be, in the Bombay Presidency, under clause 2 of section 5 of Regulation II of 1827 But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on its determination of that issue If it does so, it acts with material irregularity in the exercise of its jurisdiction

VENKUBÁI v. LAKSHMAN VENKOBA KHOT 617

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JURISDICTION—*Decree—Execution—Attachment of assets of a judgment-debtor outside the jurisdiction of the attaching Court—Practice—Procedure.*] The plaintiff, having obtained a decree against the defendant in the Court at Bhusával, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusával and Nágpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusával Court to the defendant's disbursing officer at Nágpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusával Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusával. On reference to the High Court,

Held, that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusával Court. The proper procedure was to send the decree of the Bhusával Court for execution to Nágpur, where the disbursing officer resided, and the defendant's pay was available for satisfaction of the decree.

RANGO JAIRÁM *v.* BÁLKRISHNA VITHAL 44

———*Decree—Execution—British Courts in India, power of, to send their decrees for execution to Courts not in British India—Practice.*] The Courts of British India have no authority to send their decrees for execution to Courts not in British India.

KASTURCHAND GUJAR *v.* PARSHÁ MAHÁR 230

———*High Court of Bombay, jurisdiction of—Letters Patent, 1865, Cl. 12—Persons not British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—British subjects resident outside the jurisdiction, but carrying on business by an agent within the jurisdiction—Cause of action arising wholly outside the jurisdiction.*] In clause 12 of the Letters Patent, 1865, of the Bombay High Court the words "if the defendant... shall...carry on business," must be interpreted to mean "if the defendant *being a British subject*...shall ..carry on business," and where the liability of a foreigner is in question, the "carrying on business" must include actual residence.

The scope and object of clause 12 of the Letters Patent was to define the jurisdiction of the Municipal Courts of India. It must, therefore, be read by the light of the general principles of municipal jurisdiction, save so far as it expressly derogates from their general principles.

Every statute is to be interpreted and applied, so far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of international law. All legislation is, *primâ facie*, territorial. It binds all subjects of the Crown, but only such subjects of other countries as have brought themselves within the allegiance of the Sovereign.

A person not a British subject resident out of the jurisdiction, but carrying on branch business in Bombay through an agent, is not liable to be sued in the High Court of Bombay where the cause of action has arisen wholly outside the jurisdiction.

Semble—The High Court has jurisdiction in such cases where the defendant is a British subject.

KESSOWJI DÁMODAR JAIRÁM *v.* KHIMJI JAIRÁM 507

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JURISDICTION—*Malicious prosecution—Prosecution when official—Bombay Civil Courts' Act (XIV of 1869), Sec. 32—Bombay Act X of 1876, Sec. 15—Prosecution instituted by order of superior officer.*] An officer of Government, who prosecutes for an injury personal to himself, is not generally acting in his official capacity as prosecutor. If any particular class of interest is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings.

A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not assigned to an officer as such, the consent or the order of his superior will not make the act an official one which in its nature is not so, as lying outside his official functions.

The defendant was a forest officer in the service of Government. He prosecuted a certain person for theft in the Magistrate's Court at Sirsi. The accused was defended by the plaintiff, who was a pleader. During the hearing of the case the defendant in open Court made use of certain expressions towards the plaintiff, which it was alleged were defamatory, and were calculated to lower him in the estimation of the public, to injure his reputation, and to mar his professional prospects. The plaintiff sent him a notice claiming Rs 4,500 as damages for the injury done to him by the defendant. The defendant thereupon lodged a complaint before the Divisional Magistrate at Sirsi, charging the plaintiff, under section 189 of the Indian Penal Code (Act XLV of 1860), with holding out a threat, &c., to a public servant for the purpose of inducing him to refrain from doing his duty as such public servant. The Magistrate dismissed the charge, and the plaintiff then filed the present suit against the defendant for malicious prosecution. The defendant pleaded that in lodging the complaint against the defendant he had acted in his official capacity and under the orders of his superior officer with reasonable and probable cause, and not maliciously; that the suit was brought with reference to an act done by him in his official capacity as forest officer, and that, therefore, the Court of the Subordinate Judge has no jurisdiction. The Subordinate Judge held that he had no jurisdiction, being of opinion that the defendant had prosecuted the plaintiff in his character as a public servant, and that, therefore, the present suit against the defendant was one in which an officer of Government in his official capacity was a defendant, and as such was cognizable by the District Judge only under section 32 of the Bombay Civil Courts' Act (XIV of 1869). He, therefore, dismissed the suit. In appeal, the Acting District Judge was also of opinion that the Subordinate Judge had no jurisdiction; but he held that the Subordinate Judge was wrong in dismissing the suit, instead of returning the plaint for presentation to the District Court. He, therefore, reversed the decree of the Subordinate Judge, and referred the plaintiff to the District Judge.

On appeal by the plaintiff,

Held, by the High Court, that the defendant was sued as a private person for an alleged wrong to the plaintiff, and that the suit was rightly brought in the Court of the Subordinate Judge. The order appealed from was, therefore, reversed, and the District Judge was directed to dispose of the appeal on its merits.

GOPI MAHÁBLESVAR BHAT *v.* SHESO MANJU 358

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JURISDICTION—*Property dedicated to idol—Trustee—Primogeniture—Takit Mahárdj, office of—Deposition from office by sovereign prince—Effect of order of deposition.*
See HINDU LAW 331

———*Small Cause Court—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of* 1882, *Sec.* 38.
See SMALL CAUSE COURT 573

———*Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XIV of* 1882), *Sec.* 111—*Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice.*] In a suit brought by the plaintiff to recover Rs. 36-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court,

Held, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.
RÁMPRATÁP *v.* GANESH RANGNÁTH 31

KHOJA MAHOMEDANS—*Khoja Mahomedans, law applicable to—Partition—Right of a son to obtain partition of ancestral property in his father's life-time without his father's consent—Distinction between ancestral and self-acquired property among Khoja Mahomedans—Custom, proof of—Practice—Evidence—Burden of proof.*] Amongst Khoja Mahomedans a son is entitled to obtain partition of ancestral estate in his father's life-time without his father's consent.

By the law and customs of Khoja Mahomedans there is a distinction between ancestral and self-acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law.

The presumptions of the Hindu law apply to Khoja Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. Therefore in a suit for partition brought by a son against his father, who alleged that the customs and usages of the Khoja community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's life-time a partition of the property in the father's hands whether ancestral or self-acquired,

Held, that the burden of proving the issues framed upon these allegations lay upon the defendant.

In considering the question of the alleged custom and usages the Court adhered to the less stringent rule of proof applied in *Hirábái v. Gorbái* (12 Bom. H. C. Rep., 294.)

In the same suit where the defendant having failed to establish the existence of the special custom and usages above mentioned, yet resisted the plaintiff's claim to partition, on the ground that the property claimed was not ancestral,

Held, that the *onus* was on the plaintiff, in the first instance, to give evidence that the property was ancestral. In such cases the

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amount of evidence required to shift upon the defendant the burden of displacing it depends on the circumstances of each case.

CÁSSUMBHOY AHMEDBHOY *v.* AHMEDBHOY HABIBBHOY AND RAHIMBHOY ALLÁDINBHOY 280

KHOT—Managing khot's right to create tenancies—Máphi istáva lands—Suti lands—Sanad—Construction—Fraud.] A managing *khot* is entitled, without any express authorization, to create tenancies in land even though the reversionary interest in it is vested in the person whose lessee he is. If such a *khot* himself takes up land, he can do so consistently with the conditions of the *khoti* tenure; for a *khot*, as regards lands in his private occupation, may be a tenant to himself *quâ khot*.

In 1832 the British Government granted to the plaintiff's father, Mahomed Ibráhim Makba, the village of Ransai on *khoti* tenure by a *sanad* which provided *(inter alia)* as follows :—

1. That the whole of the land lying waste in the village in the year 1830-31 was granted as *inám*.

2. That, exclusive of this *inám* land, all the rest of the village was granted on *khoti* tenure on certain conditions and stipulations set forth in twelve clauses, the chief of which were the following :—

Clause 1st provided that the *khot* should annually pay to Government a fixed sum of Rs. 249 2as. 35rs.

Clause 7th provided that the *khot* should allow the lands, which had been granted on *máphi istáva* tenure to certain *kowlárs* before the date of the *sanad*, to continue in their possession; that he should every year recover from them the Government dues and pay the same over to Government in addition to the amount stipulated with him on account of the *khotship*.

Clause 9th provided that the holders of the *suti* lands in the village were the owners of those lands. Should a new survey be made and a new assessment settled, the same should be settled by Government for the holders of the *suti* lands agreeably thereto.

From 1845 to 1871 the management of the *khoti* village was entrusted to the defendant as a *maktádár*, or lessee, under two *kabuláyats* passed by him—one in 1845 to Mahomed Ibráhim Makba, the grantee of the *khoti* village, and the other in 1858 to the grantee's heirs and legal representatives.

By clause 5th of the *kabuláyat* of 1858 the defendant agreed to carry on the management of the village and render a detailed account of the balance of the village revenue every year.

Clause 7th of the same *kabuláyat* was in the following terms :—

"I (the lessee) will bring under cultivation and into prosperous state the waste, culturable, and unculturable land of the aforesaid village. I will take the proceeds of the same during the years of my contract. After the expiry of the years of the contract you are to take the assessment of the fields according to the practice of the village. I have nothing to do with the same. I will not let (the village) nor lease to anybody for a longer period than for the period of the contract. If I let it, I will make good the damage you may suffer."

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In 1859 some of the *máphi istáva* lands were sold by the Collector for the arrears of assessment, and bought in by Government. The defendant applied to the Collector to have the lands transferred to him, and the Collector transferred them to his name.

Shortly afterwards the defendant acquired some more lands, which were held on *suti* tenure in the village. He either purchased them or took them up on the tenants abandoning them. In 1861, when the survey was introduced into the village, he got his title to these lands recognized by the Superintendent of Survey.

In 1871 the defendant's management of the village ceased. But he refused to deliver up to the plaintiff either the *máphi istáva* or the *suti* lands which he had acquired during his management.

The plaintiff, therefore, sued, as *khot* of the village, to recover the said lands with mesne profits, alleging that the defendant had illegally and fraudulently acquired those lands on his own account while acting as plaintiff's agent, and praying that he should be declared to have acquired and held them in trust for the plaintiff.

The defendant contended *(inter alia)* that the lands in suit were not included in the *khoti* grant; that they belonged to Government; that he had acquired some from the Collector and the rest from the Superintendent of Survey; that under his *kabuláyats* he was entitled to take up the lands direct from Government, and that the plaintiff was only entitled to the assessment due on the lands which he had refused to accept. Lastly, the defendant denied that he had acted in fraud of the plaintiff's rights in acquiring the lands in dispute on his own account.

Held, on the construction of the *sanad*, that the plaintiff being the *khot* of the whole of the village exclusive of the land granted in *inám*, the *máphi istáva* lands were included in the *khoti* grant; that the *khot's* interest in them, whatever might be the extent of it, was not separable from the *khoti* estate; and that the *khot* had a reversionary interest in the *máphi istáva* lands as well as in the *suti* lands, which had been abandoned by their former occupants.

Held, also, that the defendant was not precluded by the terms of his lease from acquiring the lands in dispute on his own account. The engagement to furnish accounts of the balance of the village revenue at the end of each year was simply an engagement to furnish the plaintiff with information which would be of use to him, and which indeed it would be necessary for him to possess when he resumed the management of the village on the determination of the lease. It imported nothing more than that; and the whole transaction evidenced by the *kabuláyats* was merely an assignment, in consideration of a fixed annual payment to be made by defendant to plaintiff, of the rights and liabilities of the latter to be exercised and discharged for a certain period by the former. For that period the defendant was the *makádár* or tenant of the plaintiff's *khotship*; and though a certain confidence was necessarily reposed in him in connection with a tenancy of this nature, and though he was bound jealously and scrupulously to protect the plaintiff's interests, so far as they were in his keeping, yet he was not bound by the strict rule which prohibits a trustee from acquiring for himself an estate of his *cestui que trust*.

Under clause 7th of the *kabuláyat* of 1858 the defendant was at liberty either to take up waste lands himself or put in tenants; if he put in tenants on leases, the special advantages of any leases were to expire with his own lease. But the actual occupation of land

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either by himself or by his tenants was not to be interfered with at the determination of his lease, so long as he or they continued to pay the assessment according to the practice of the village.

The defendant could, therefore, without the intervention of the Collector, have taken up the *máphí istáva* lands in suit and become himself the tenant; and he could have also acquired the *suti* lands from former *sutidárs*, or taken them up, if waste, without the intervention of the Survey Superintendent. The circumstance that, when acquiring the lands he needlessly invoked the assistance of the Revenue authorities, would not invalidate his title if it could not be impugned on other grounds.

Held, further that the defendant was not guilty of fraud, as there was no evidence to show that he had acted in a surreptitious or secret manner in acquiring the lands in suit. On the contrary his action in applying to the Revenue authorities was a sign of his good faith rather than of any fraudulent intent. The plaintiff was, therefore, not entitled to oust the defendant from the lands in suit.

FA'KI ISMÁIL *v.* MAHOMED ISMÁIL 595

KHOT—Proprietary right of khot to khoti vatani land—Right of such khot to forest land and to timber and wood growing therein—Government, right of, to appropriate to forest preserves assessed or unassessed land—Construction of such khoti grants.] The plaintiff sued the defendant, alleging that that village of mauze Ambedu, in the Ratnágiri District, was his *khoti vatani* village in which his proprietary right extended to raise crop of any kind or to preserve and cut the jungle and forest trees on the lands therein. He complained that since 1855-56 the Collector of the district prohibited him from exercising the above alleged rights, and prayed that the obstruction might be removed and Rs. 600 awarded as damages. The plaintiff based his claim mainly on the settlement of 1788, Dunlop's proclamation of 1824, and several other *khoti* grants in the district. The defendant denied that the plaintiff had any proprietary right in the village, and contended *(inter alia)* that the *khot* derived his rights from the yearly *kabulâyats* passed by him, that his right to cultivate did not extend to cultivating the jungle land, and that his position was no better than that of a *patel*.

Th Joint Judge who tried the suit held that under the settlement of 1788 the plaintiff, as *khot*, was entitled to the jungle produce, except timber; that in virtue of Dunlop's proclamation of 1824 the plaintiff acquired an unqualified right to the forest land in the village and timber growing on it, and that the defendant had no right to appropriate assessed or unassessed land for forest purposes, and awarded the plaintiff the sum of Rs. 600 as damages. On appeal by the defendant to the High Court,

Held, that the application of the general rules of construction of grants to a subject by the State requires that language of such general import as is ordinarily to be found in the *khot's sanads*, should be taken most beneficially to the State.

Held, accordingly, that, in the absence of a *sanad* expressly granting it, the ownership neither of the soil nor of cultivated or uncultivated lands passes by the grant of the *vatandári khotship*.

Held, also, that the grant of the *vatani khoti* did not make the *khot* a perpetual tenant of Government in respect of all lands in the village, except *dhárá* lands.

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Held, that a permanent relationship was created between the Government and the *khot* which could not be interfered with as long as the settlement of 1788 was in force, except with the *khot's* consent, and, therefore, that in 1855, when the *pahâni* of 1788 was in force, the Government could not withdraw the *thikân* in question from the plaintiff's cultivation.

Held, also, that, in the absence of evidence to show that the right to the jungle produce was intended to be reserved to Government, the plaintiff was entitled to cut down brushwood whether as a source of revenue or for the purpose of bringing the land into cultivation.

Held, that the respondent was entitled to damages for the years during which he had been excluded, and to an injunction restraining the defendant from excluding him in the future.

Held, also, that, as *khot*, the respondent had no right to cut timber in forest and uncultivated lands whether by virtue of his *khotship* or Dunlop's proclamation.

THE COLLECTOR OF RATNÁGIRI *v.* ANTÁJI LAKSHMAN ... 534

LANDLORD AND TENANT—*Mortgage—Mortgaged land subsequently sold by mortgagee in execution of a money decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Limitation Act XV of 1877, Sch. II, Art. 136—Tenant denying landlord's title—Notice to quit—Decree—Execution—Civil Procedure Code (VIII of 1859), Sec. 213.*

See MORTGAGE 678

Sale by landlord of land held by tenant—Fraud in such sale—Suit by purchaser against tenant—Plea by tenant impeaching sale by his landlord—Limitation.] The defendant was tenant of the lands in dispute under a lease dated 22nd June, 1875. In 1878 his landlord sold the lands to the plaintiffs by registered deed, but in 1879 complained to the Mámlatdár that he had been cheated by the plaintiffs, who, he alleged, had not paid the purchase-money. This allegation the plaintiffs denied.

In September, 1881, the defendant brought a suit against the plaintiffs, in which he prayed for a declaration that the sale of the land to the plaintiffs was fraudulent, and that no consideration had been paid. This suit, however, was withdrawn by the defendant on the 15th November, 1881, with leave to bring a fresh suit, but no fresh suit was brought by him within three years from November, 1881, nor was any suit brought by the plaintiffs' vendors to set aside their sale to the plaintiffs.

In 1883 the plaintiffs brought this suit against the defendant to recover Rs. 960 as arrears of rent for four years for the lands described in their plaint. They alleged that the lands in question had been sold to them on the 12th September, 1878, and that the lands mentioned in their plaint had been leased on the 22nd June, 1875, to the defendant by their (the plaintiffs') vendors, and that in that lease the defendant had contracted to pay Rs. 240 annually. The defendant in his defence again raised the question whether the sale to the plaintiffs was not fraudulent and without consideration.

Held, that the right of the defendant to plead as a defence to this suit, that the plaintiffs' purchase of the 12th September was fraudu-

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lent and void, was barred. As a tenant he had no independent right to impeach the sale by his own landlords. He could only do so with their consent, assuming it to be still open to them to impeach it. But their complaint to the Mámlatdár in 1879 showed that they were then acquainted with the facts which entitled them to set aside the sale, and by the end of 1882, at the latest, their right to file a suit for that purpose was, therefore, barred Their right to impeach the sale by suit being thus barred, their tenant (the defendant) could not be allowed to impeach it as a defence to an action by the plaintiffs.

JUGALDÁS *v.* ÁMBÁSHANKAR 501

LANDLORD AND TENANT—*Tenant denying landlord's title—Right of landlord to evict.*] A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord.

VISHNU CHINTÁMAN *v.* BA'LÁJI BIN RA'GHUJI 352

LIMITATION—*Annuity—Decree for payment of annuity without specifying date of payment—Decree—Execution—Maintenance—Default in paying such annuity—Enforcement of payment by execution of decree—Computation of time.*] A Hindu widow obtained a decree, dated 7th September, 1865, directing that a sum of Rs. 30 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, and recovered three years' arrears. In 1885 payments having again fallen into arrear, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application.

Held, that the application was not time-barred. The decree created a periodically recurring right. Though no precise date was specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court.

LAKSHMIBÁI BÁPUJI OKÁ *v.* MÁDHAVRÁV BÁPUJI OKÁ ... 65

———*Civil Procedure Code (Act XIV of 1882), Sec. 622—High Court's revisional powers—Material irregularity.*] On the 29th November, 1886, this suit was filed on a bond dated the 29th November, 1881, payable in two years.

The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November, 1883.

Against this decision the plaintiff applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Held, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November, 1883,—that is, the day of the month corresponding with the day on which the bond was dated.

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Held, further, that the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible there is no remedy under section 622 of the Code or under the provisions of section 15 of Statute 24 & 25 Vic., c. 104, whatever remedy there may be, in the Bombay Presidency, under clause 2 of section 5 of Regulation II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction.

VENKUBÁI *v.* LAKSHMAN VENKOBA KHOT 617

LIMITATION—*Joint family—Death of judgment-debtor—Execution—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice.*] An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative.

Accordingly where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June, 1881, under a *darkhást* No. 718 of 1878, against V., one of the three sons of the debtor, and the execution proceedings continued till the death of V. in March, 1884, whereupon the plaintiff applied on the 28th May, 1884, to put M. and N., the brothers of V., on the record as his representatives,

Held, that the application was not too late against M. and N. regarded as joint representatives with their brother V. of their father, the original judgment-debtor.

KRISHNÁJI JANÁRDAN *v.* MURÁRRÁV AND NARSINGRÁV ... 48

————————ACT XV OF 1877, SECS. 5 AND 14—*Delay—Sufficient causes—Deduction of time spent in another litigation in respect of the same subject-matter—Mistake of law.*] Mere ignorance of the law cannot be recognized as a sufficient reason for delay under section 5 of the Limitation Act (XV of 1877).

A obtained a decree against *B* as the heir and legal representative of his deceased uncle *C*. The decree directed that the amount adjudged should be recovered from *C*'s assets in the hands of *B*. In execution of this decree certain property was attached. *B* claimed this property as his own, and sought to remove the attachment, but the Court passed an order confirming the attachment on the 20th November, 1880. In 1881 *B* filed a regular suit to set aside this order. The suit was dismissed in 1885 as barred by section 244 of the Civil Procedure Code (Act XIV of 1882). Thereupon *B* filed an appeal from the order in execution made on the 20th November, 1880. This appeal was rejected as time-barred under article 152 of Schedule II of Limitation Act XV of 1877.

Held, that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff

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was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit.

SITÁRÁM PARAJI *v.* NIMBHÁ 320

LIMITATION ACT XV OF 1877, SEC. 7 AND ARTICLE 12.

See MINOR 18

——————————SEC. 14—*Hindu law—Ancestral property—Joint family—Alienations by father—Son's liability for father's debts—Execution—Purchaser—Notice—Exclusion of time taken up in prosecuting a former suit which was eventually withdrawn.*

See HINDU LAW... 625

——————————SEC. 19—*Oral evidence of acknowledgment—Advisability—Acknowledgments made before the coming into force of Act XV of* 1877—*Evidence.*] Under section 19 of the Limitation Act (XV of 1877), oral evidence of the contents of an acknowledgment cannot be received, nor is there any saving of acknowledgments received or given back before the Act came into operation.

ZIULNISSA LÁDLI BEGAM SÁHEB *v.* MOTIDEV RATANDEV ... 268

——————————SCH. II, ART. 138—*Mortgage—Mortgage land subsequently sold by mortgagee in execution of a money decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Landlord and tenant—Tenant denying landlord's title—Notice to quit—Decree—Execution—Civil Procedure Code (Act VIII of* 1859), *Sec.* 213.

See MORTGAGE 678

LIS PENDENS—Mortgage—Purchase, without notice, of land declared liable for mortgage-debt by a decree.] In 1864 A. mortgaged four shops to the plaintiff's father. Subsequently, however, A.'s father brought a suit, and obtained a decree declaring that two of these shops were not included in the mortgage. In 1869 the plaintiff's father (the mortgagee) sued A. upon the mortgage, and prayed in the same suit that certain other land not included in the mortgage-deed might be held liable for his debt in lieu of the two shops. He obtained a decree on the 29th November, 1869, which ordered Rs. 1,291 to be paid "on the liability of the land in the plaint mentioned." No steps were taken by the plaintiff to execute this decree for seven years. On the 18th August, 1876, A. sold to the defendant by a registered deed of sale, a portion of the land so declared liable, and the defendant entered into possession without notice of the plaintiff's decree. The plaintiff now sued to obtain a declaration, that the land was liable to be sold in execution of his decree of 1869. Both the lower Courts dismissed his suit. On appeal to the High Court,

Held, that the defendant was a purchaser for value, without notice, of the plaintiff's decree, and took the land unaffected by the plaintiff's equitable lien created by the decree. There was no *lis pendens*. The *litis contestatio* had ceased. The decree, which was a final one, had terminated the litigation between the parties, and now only remained to be executed. There was, moreover, in this case the further circumstance that nothing had been done in the suit after the decree

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and during the seven years which elapsed between it and the defendant's purchase in 1876.
VENKATESH GOVIND v. MÁRUTI 217

MAINTENANCE—*Decree—Execution—Decree for payment of an annuity without specifying date of payment—Default in paying such annuity—Enforcement of payment by execution of a decree—Limitation—Computation of time.*] A Hindu widow obtained a decree dated 7th September, 1865, directing that a sum of Rs. 36 should be paid to her every year on account of her maintenance. The judgment-debtors paid the annuity for some years. In 1881 the widow applied for execution of the decree, and recovered three years' arrears. In 1885 payments having again fallen into arrear, she again applied for execution, but her application was rejected as barred by limitation, having been made more than three years after the last preceding application.

Held, that the application was not time-barred. The decree created a periodically recurring right. Though no precise date was specified in the decree for payment of the annuity, the judgment-debtors were liable to make the payment on the day year from its date, and thenceforward on the corresponding date year after year. The decree was, as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year. The right to execute accruing on a particular day, limitation should be computed from that day should the judgment-debtor fail to obey the order of the Court.
LÁKSHMIBA'I BA'PUJI OKA v. MA'DHAVRA'V BA'PUJI OKA ... 65

———*Hindu law—Incontinence of a co-parcener's concubine disentitling her to maintenance.*] Continued continence is, under the Hindu law, a condition precedent to deceased co-parcener's concubine claiming maintenance.
YASHVANTRÁV v. KÁSHIBÁI 26

MALICIOUS PROSECUTION—*Jurisdiction—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), Sec. 32—Bombay Act X of 1875, Sec. 15—Prosecution instituted by order of superior officer.*
See JURISDICTION 358

MA'MLATDA'RS' COURTS ACT (BOMBAY ACT III OF 1876), SEC. 4, CL. II—*Jurisdiction to grant an injunction—Possession—Physical possession—Disturbance of possession.*] Under section 4, clause II, of the Mámlatdárs' Act (Bombay Act III of 1876) a Mámlatdár can grant an injunction in those cases only in which an interruption of *physical* possession or enjoyment is sought to be removed.
DESA'I MA'LA'BHA'I BA'PUBHA'I v. KESHAVBHA'I KUBERBHA'I ... 419

MANAGER—*Hindu law—Joint family—Parties to suit—Practice—Suit by manager alone—Co parceners made parties on objection by defendant—Civil Procedure Code (Act XIV of 1882), Sec. 30—Amendment of pleadings—Plaint amended in second appeal by adding parties.*
See HINDU LAW 185

MARRIAGE—*Hindu law—Guardianship—Custody—Right of father to give his daughter in marriage—Conduct of father forfeiting such right—Suit by a father to restrain his wife from giving their daughter*

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in marriage without his consent.] The plaintiff and Ramábái, the second defendant, were husband and wife belonging to the Prabhu caste, and lived together in the house of the first defendant, who was Ramábái's father, until the year 1880. In 1877 a daughter Sonábái had been born to them. In 1880 the plaintiff was convicted of theft, and sentenced to two years' imprisonment. At the end of his term of imprisonment he did not return to live with his father-in-law, but went to reside in his old father's house, where in 1884 he requested his wife Ramábái to join him with their daughter Sonábái. Ramábai refused, and she and Sonábái continued to live in the house of the first defendant, her father. The plaintiff then married a second wife. In November, 1885, Sonábái having attained nine years of age—an age at which it is customary for Prabhus to seek husbands for their daughters—demanded his daughter Sonábái from the defendants, who, however, refused to deliver the girl to the plaintiff. In May, 1886, the plaintiff filed this suit against the defendants, complaining that they were about to have his daughter Sonábái married to her cousin without his (the plaintiff's) consent. He prayed that he might be declared entitled to the custody of his daughter, and for an injunction against her marriage without his consent. On filing this suit he obtained a *rule nisi* for an injunction against the defendants.

Held that, pending the hearing of this suit, he was entitled to the injunction asked for.

NÁNÁBHÁI GANPATRÁV DHAIRYAVÁN *v.* JANÁRDHAN VÁSUDEV AND RAMÁBÁI... 110

MARRIAGE—*Hindu law—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.*] The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty, the Court may interfere even in the case of a father.

One Girdhar died, leaving a widow and an infant daughter named Báni. After Girdhar's death his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parent's house. There she died about eighteen months after Girdhar's death. The orphan Báni was then brought up by her maternal uncles, Shridhar and Goverdhan.

When Báni became ten or eleven years old, her paternal uncle Hirálál and paternal grandmother Rakhmabái sought, under Act IX of 1861, to take possession of the minor Báni from the custody of her maternal uncles. This application was resisted by Shridhar and Goverdhan, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhátiá in Bombay for a large sum of money.

The Court found that several Bhátiá girls of Dharangaon, where the parties resided, had of late been married to old Bhátiás in Bombay, the girls' relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she

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should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court.

Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizápur, a town in the Nizám's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioners' custody a month before the day fixed for the marriage. Against this order, Shridhar and Goverdhan appealed to the High Court.

Held, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they had never taken care of the girl, it was necessary, in the interests of the minor, to put them upon terms to prevent the possibility of their abusing their authority to the minor's prejudice.

Held, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Courts in British India.

Held, also, that the girl ought not to be forced into marrying a person whom she does not like.

SHRIDHAR *v.* HIRÁLÁL VITHAL 480

MARRIED WOMAN—*Execution of decree—Liability of married woman—Arrest—Stridhan—Application for review of an order contrary to law—Waiver.*] R., as a surety for her husband, joined with him in executing a bond for Rs. 90. In a suit brought upon the bond, a decree was passed against both. R. was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency sections of the Civil Procedure Code (Act XIV of 1882), but not doing so she was committed to jail. Subsequently, however, she applied to be declared an insolvent, but her application was rejected. She then claimed to be released, on the ground of her coverture. The Judge rejected her application as being too late. On reference to the High Court,

Held, that her application for release was virtually an application for review of the order for her imprisonment, on the ground that it was contrary to law; that her mere omission to take the objection at the time of her arrest could not be regarded as a waiver of her right of exemption from arrest; and having regard to the nature of the right claimed, it was one which the Court could not properly decline to consider on review, however late the application might have been.

Held, also, that although the decree was absolute in its terms, and contained no express limitation of R.'s liability, nevertheless the law being clear that she could only be liable to the extent of her *stridhan*, it was to be assumed that the direction to pay, contained in the decree, had reference to that fund only.

IN *RE* THE PETITION OF RÁDHI 228

MESNE PROFITS—*Declaratory decree—Separate suit—Mesne profits, meaning of—Decree awarding mesne profits—Construction.*] In 1878 the plaintiff obtained a decree declaring that he was entitled to receive, every year, from the defendant 12 *per cent.* of the rents and

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profits of a certain *inam* village. The decree also awarded mesne profits from the date of the institution of the suit.

In 1884 the plaintiff sought in execution of this decree to recover his share of the profits of the village for the years 1882-83 and 1883-84.

Held, that the plaintiff could not proceed to enforce his rights under the decree by way of execution. His remedy was by a suit on the right established by the decree. The decree had merely declared the right of the plaintiff to a certain share of produce, and payment was ordered of mesne profits computed according to certain principles. Such an award was not an award of a periodical payment *in æternum*. The very word "mesne" implied a terminus *ad quem* as well as *a quo*, and in the absence of a special order the terminus was the date of the decree.

VINÁYAK AMRIT DESHPÁNDE *v.* ABÁJI HAIBATRÁV 416

MINOR—*Act XX of* 1864, *Sec.* 18—*Sanction of alienation of minor's property—Civil Procedure Code* (*Act X of* 1877), *Sec.* 462—*Compromise on behalf of a minor—Mortgage—Assignment of mortgage by guardian of minor—Suit on mortgage by assignee—Proof of assignment when necessary—Consideration for assignment—Adequacy of consideration.*] Section 18 of the Minors' Act XX of 1864 applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow, acting as natural guardian of her minor son, but who has not obtained a certificate under the Act (XX of 1864), is not invalid because effected without the sanction of the Court.

Where a widow acting as natural guardian of her minor son assigned a mortgage which had been executed to her deceased husband for a consideration, a part of which was a sum due under a decree to the assignee,

Held, that such an assignment was not invalid under section 462 of the Civil Procedure Code (Act X of 1877). Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable would only affect the consideration for the assignment by reducing its amount.

The plaintiff sued, as assignee of a mortgage, to recover the debt due from the mortgagors personally and from the property mortgaged. The assignor was a Hindu widow, acting as natural guardian of her minor son. The consideration for the assignment was a sum of Rs. 68-9-0 due to the plaintiff under a decree obtained by him and Rs. 30-7-0 cash paid.

The lower Courts held that, as to the Rs. 68-9-0, the transaction really amounted to a satisfaction or adjustment of the decree under which it was due, and that as such adjustment had not been certified to the Court it was invalid; they further held that the consideration for the assignment of the mortgage, having so far failed, the assignment was without adequate consideration, and, therefore, they dismissed the suit. On appeal to the High Court,

Held, that although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that under the peculiar circumstances of this case that rule did not apply. The mortgage-deed was assigned by a widow acting as the natural guardian of a minor, and a great part of the consideration for the assignment had admittedly failed, the confirmation of the decree

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which formed part of the consideration not having been certified to the Court. There was on the record no admission of the assignment by the assignor. It might be that the minor in a suit by his next friend or guardian appointed under Act XX of 1864 might dispute the assignment. The defendants in order to protect themselves had a right to call on the plaintiff to prove the assignment, and a Court ought in the interests of justice to see that they were so protected. The assignment was on behalf of a minor, and the person acting as his guardian had not admitted it, and it might be that even her admission would not be binding on him, since he was not a party to the suit. It was necessary that the point should be so tried and determined as to bind the minor, and to do that it was essential that he should be made a party to the suit.

The Court, therefore, reversed the decree of the lower Court and remanded the case.

MANISHANKAR PRÁNJIVAN v. BÁI MULI 686

MINOR—*Decree—Execution—Sale in execution of a decree against a deceased person represented by a minor son—How far such sale affects interest of an heir not party to decree or execution proceedings.*] K., a Mahomedan woman who was a co-sharer in a certain *khoti vatan*, died indebted, and was sued after her death as "represented by her minor son represented by his guardian." A decree having been obtained against K. thus represented, her share in the *khoti* was put up for sale in execution, and was purchased by the plaintiff, who obtained a sale certificate reciting that the right, title, and interest of K. in the said *khoti* had been purchased by him. He now sued the defendants, who were K.'s co-sharers in the *khoti*, to recover the profits of K.'s share which they had received.

K., besides her minor son, had left her surviving a daughter who had not been made a party to the suit or to the execution proceedings, and the defendants contended that her share in her mother's estate had not passed to the plaintiff.

Held, that the plaintiff was entitled to the whole of K.'s share. The debt due by K. was one for which the daughter was equally responsible; and having regard to the form of the suit and the execution proceedings, the plaintiff was justified in assuming that he was bidding for the entirety of K.'s share, and would acquire a title unimpeachable by the daughter.

KHURSHETBIBI v. KESO VINÁYAK 101

———*Guardian—Representative of minor in a suit against him—Certificate—Act XX of 1864—Joint family—Mortgage by father and eldest son—Death of father and eldest son—Decree obtained by mortgagee against minor son represented by the widow—Sale in execution—Subsequent suit by minor to set aside sale—Limitation for such suit—Act XV of 1877, Sch. 7 and Art. 12—Family debt binding on minor son.*] In 1862 Rájkaran and his son Amrá mortgaged the property in dispute to Bezanji. In 1863, Rájkaran died, leaving a widow, Shivbá, and two sons, *viz.* Amrá and Parbhu, a minor. In 1866, Amrá and Shivbá, the latter of whom acted for herself and as guardian of her minor son Parbhu, settled the account with Bezanji, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 Amrá died. In 1869 Bezanji's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against Shivbá both as guardian of the minor Parbhu and also against her in her individual capacity. At the Court sale held in execution of this decree, Dáji purchased the property in dispute in 1870.

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In 1881 Parbhu filed the present suit to recover possession of the property, alleging that Dáji's purchase was invalid as against him, he having been a minor at the time of the Court sale. He subsequently assigned his interest to the respondent (second plaintiff). It was contended on behalf of the defendant Dáji, that the suit, not having been brought within one year after Parbhu had attained majority, was barred by limitation under article 12, Schedule II, of Act XV of 1877.

Held, that the suit was not barred by limitation. Parbhu had not been properly represented by Shivbá in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX of 1864). Parbhu was, therefore, not bound by the decree in that suit, or by the sale in execution, and article 12, Schedule II, of Act XV of 1877 did not apply.

Held, also, upon the merits, that the debt for which the decree was passed being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was, therefore, not entitled to disturb the execution purchaser.

DÁJI HIMAT *v.* DHIRAJRÁM SADÁRÁM 18

MINOR, SUIT AGAINST—*Practice—Názir appointed guardian ad litem—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of* 1882), *Sec.* 458—*Procedure.*] There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Názir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the Názir has been unavoidably prevented from making himself acquainted with the case against the minor.

In a suit against a minor residing in a Native State at a distance from the Názir of the Court, who was appointed guardian *ad litem*, and the Názir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay,

Held, that the Court, if it chose, might cancel the appointment of the Názir as guardian *ad litem* under section 458 of the Civil Procedure Code (Act XIV of 1882).

NÁRÁYANDÁS RÁMDÁS *v.* SÁHEB HUSEIN 553

MONEY—*Contract Act IX of* 1872, *Secs.* 73 *and* 74—*Damages—Agreement to lend money—Damages recoverable by lender for breach of such agreement.*] The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of Rs. 20,000 at 7½ *per cent. per annum* for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March, 1887, and that the plaintiff's attorneys had prepared the necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 *per cent. per annum*, and his *munim* took it to the attorneys' office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed, as damages, interest on the Rs. 20,000 at 1½ *per cent. per annum* for the three years for which under the agreement the loan was to be made.

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Held that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the Rs. 20,000 at the rate of interest agreed upon between him and the defendant. The Court accordingly awarded him interest at 1¼ *per cent. per annum*, (*i. e.*, the difference between the banker's rate of interest and the contract rate), on Rs. 20,000 for four months, together with the expense of preparing the deeds required for the purpose of the loan.

DATUBHÁI EBRÁHIM *v.* ABUBAKER MOLEDINA 242

MORTGAGE—*Clause of conditional sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee but absolutely—Subsequent suit for redemption barred—Res judicata—Limitation Act XV of 1877, Sch. II, Art. 134—Landlord and tenant—Tenant denying landlord's title—Right of landlord to suit.*] In 1863 Báláji and Gyánu mortgaged certain land to one Gopál under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of Gopál, the mortgagee.

In 1871 Gopál filed an ejectment suit against Báláji and Gyánu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to Hari, who now, in collusion with the other two defendants, (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopál's title as owner as against the mortgagors, Báláji and Gyánu, who claimed a right to redeem. A decree was passed in 1872 ordering Báláji and Gyánu to pay Rs. 100 to Gopál within one month, or in default, to deliver up to him possession of the land. The money was not paid, and Vishnu, as purchaser from Gopál, got possession in execution of the above decree in August, 1873.

In September, 1885, the plaintiff, as Báláji's heir and legal representative, filed a suit against Gopál and Vishnu to redeem the property. The Court of first instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. In appeal, the Court reversed this decision and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant Vishnu then applied to the High Court under its extraordinary jurisdiction.

Held, that the plaintiff's claim was *res judicata*. In the suit brought by Gopál, (the mortgagee), in 1871 he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them, by way of indulgence, one month within which to regain the land by payment of Rs. 100 to Gopál. It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished. After the lapse of the month Gopál could not have recovered the Rs. 100. Had he sought to recover that money he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed.

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Held, also, that the suit was barred under article 134 of Schedule II of the Limitation Act (XV of 1877)—Vishnu having purchased the land for value from Gopál, the ostensible owner, more than twelve years before suit.

A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord.

VISHNU CHINTÁMAN v. BÁLÁJI BIN RÁGHUJI 352

MORTGAGE—*Mention in mortgage-deed of another debt due to mortgagee distinct from sum advanced at date of mortgage—Clause in deed undertaking to pay off old debts when taking back the land—Old debt not a charge on land, but redemption conditional on payment of both debts—Execution—Claim to attached property—Order passed against claimant—Neglect of claimant to sue within a year after date of order—Civil Procedure Code (Act XIV of 1882). Secs. 278, 279, 280 and 283—Limitation Act XV of 1877, Sch. II, Art. 11.*] V. mortgaged certain land to the defendant's father for a sum of Rs. 64 advanced by the latter at the date of the mortgage. The mortgage-deed stated that V. owed the mortgagee another debt of Rs. 100 which was due on a separate bond, and it contained a clause in the following terms :—

"The principal sum of *huns* (coins) due on that document, as also this document, I will pay at the same time, and take back the land along with this document as well as that document. Till then you are to continue to enjoy the land * * *" The plaintiff having obtained a decree against the mortgagor attached the land in execution. The defendant, (son of the original mortgagee), thereupon claimed that he held a mortgage upon it to the extent of Rs. 164. On the 9th March, 1881, the Court executing the plaintiff's decree made an order allowing the defendant's claim only to the extent of Rs. 64, and directing that the land should be sold subject to the defendant's lien for that sum. The plaintiffs bought the land at the execution sale, and offered the defendant Rs. 64 in redemption of his mortgage, which the defendant refused. The plaintiffs then brought the present suit to recover possession.

Held, that the charge on the land did not include the old debt of Rs. 100. There were no words in the mortgage-deed expressly making that debt a charge on the property. The provisions in the deed only made the equity of redemption conditional on the payment of both the debts.

Quære—whether, under the circumstances of the case, the purchaser at the execution sale would be bound by such a condition.

Held, also, that the object of the defendant's application in March, 1881, was virtually that the Court should allow his mortgage to the extent of Rs. 164, and the Court, having allowed his claim only to the amount of Rs. 64 by its order, *pro tanto* rejected his application. It was, therefore, an order passed against him, and having neglected to establish his right by suit within a year from the date of that order, he was now estopped from insisting on the condition—Civil Procedure Code (Act XIV of 1882), secs. 278, 279, 280 and 283; Limitation Act XV of 1877, Sch. II, art. 11.

YASHVANT SHENVI v. VITHOBÁ SHETI 231

———*Mortgaged land subsequently sold by mortgagee in execution of a money decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Limitation Act XV of*

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1877, *Sch. II, Art.* 138—*Landlord and tenant—Tenant denying landlord's title—Notice to quit—Decree—Execution—Civil Procedure Code (VIII of* 1859*), Sec.* 213.] Where a judgment-creditor in execution of a money-decree sells property as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies even though the mortgage-deed has been registered.

In 1867, Rakhma and Gajia mortgaged certain lands to Gangárám by a registered deed of that date. In 1870, Gangárám obtained a money-decree against Rakhma and Gajia, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February, 1872, obtained possession through the Court. In the meantime, Gangárám brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April, 1872, ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against Rakhma, Gajia and Gangárám to recover the lands. He alleged that after he got possession in 1872 he had leased the property to Rakhma and Gajia.

They denied the letting by the plaintiff, and alleged that they were tenants of Gangárám.

Held, that the plaintiff was entitled to recover. Gangárám (the mortgagee) when bringing the land to sale in execution of his decree was bound by section 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not, therefore, retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale.

Held, also, that as Rakhma and Gajia claimed only to be tenants of Gangárám, they could not retain possession of the land, merely because the plaintiff had failed to prove that he had let the land to them. They denied the plaintiff's title, and were not, therefore, entitled to any notice to quit.

Held, also, that the plaintiff's suit was not barred by article 138 of Schedule II of the Limitation Act XV of 1877, inasmuch as the plaintiff had obtained possession through the Court within the twelve years preceding the suit.

AGARCHAND GUMÁNCHAND *v.* RAKHMÁ HANMANT... ... 678

MORTGAGE—*Subsequent assignment of the equity of redemption by the mortgagor—No notice to mortgagees of such assignment—No change of name in Collector's books—Further advances by mortgagees to original mortgagor on same security—Suit by assignee of equity of redemption to redeem—Liability of assignee to pay off the further advances to mortgagor—Standing by—Allowing original mortgagor's name to remain in Collector's books.*] In order to complete an assignment of an equitable estate in immoveable property it is not necessary by English law that notice of the assignment should be given to the owner of the legal estate. Nor is there any rule of Hindu law which requires notice to be given to the person in

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possession whose position may be considered analogous to the holder of the legal estate in English law.

By a registered mortgage-deed, P. in 1869 mortaged certain property with possession to the defendants. In 1871, P. sold his equity of redemption to the plaintiffs, who allowed it to remain in P.'s name on the Collector's register. Subsequently, in 1873, the defendants made further advances to P. on the security of the same mortgaged property. The plaintiffs sued to redeem. The Court of first instance rejected the plaintiffs' claim, being of opinion that their purchase was not proved. On appeal, the District Judge reversed the decree, holding that the sale to the plaintiffs was proved. He held, further, that the plaintiffs could not redeem without paying off the further advance made by the defendants in 1873, on the ground that the plaintiffs had given no notice of their purchase to the defendants, and had allowed Pándoji's name to remain on the Collector's register as the ostensible owner.

The plaintiffs appealed to the High Court.

Held, that the plaintiffs' title as assignee of the equity of redemption was complete, although no notice of the assignment had been given to the defendants. But, although such notice was not necessary to complete the plaintiffs' title, it was plain, upon general principles of equity, that if the plaintiffs' conduct was such as to amount to a standing by and allowing the defendants to make further advances to Pándoji under the supposition that he was still the owner of the equity of redemption, such conduct would give the defendants a better equity. If the property was standing in Pándoji's name in the Collector's books, the allowing it so to remain after the assignment would be sufficient for the purpose.

GOVINDRÁV *v.* RÁVJI 33

MUNICIPAL ACT (BOMBAY) III OF 1872, SEC. 198—*Obstruction—Power given by Act for public benefit—Construction.*] The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May, 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being "a projection, encroachment or obstruction" within the meaning of section 195 of Acts III of 1872 and IV of 1878. The plaintiff thereupon filed this suit, praying for an injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the roadway. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. That gutter, however, subsequently to the filing of this suit, but before the hearing, was covered over, and so much additional width was thereby added to the road.

Held, that the eaves constituted an obstruction within the meaning of the above section, and that the Municipal Commissioner was entitled to remove them.

Under the above section the question to be decided is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature it would have been expressed.

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Where an Act gives power to a Municipality or Corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage.

E. C. K. OLLIVANT *v.* RAHIMTULLÁ NUR MAHOMED ... 474

MUNICIPAL ACT (BOMBAY) VI OF 1873, SEC. 17—*Street—Authority of the Municipality under Section* 33—*Civil Courts' interference with the discretion given to public bodies.*] The word "street" in section 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes.

The plaintiff proposed to make a balcony projecting over a public road. The Municipality objected to the work, as an encroachment on a public street. He, therefore, sued the Municipality to establish his right to build the proposed balcony.

Held, that, so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street.

Section 33 of the Bombay District Municipal Act (VI of 1873) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner.

The plaintiff was the owner of two houses on each side of the passage of a *khádki* or open square, containing three or four other houses. He proposed to connect the two houses by building a storey across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local Municipality for permission to build in the manner he proposed. The Municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses.

The plaintiff thereupon sued the Municipality to establish his right to build the proposed structure. It was contended for the plaintiff that the Municipality ought not to have refused permission in the interests of the neighbouring house-holders, who were able to protect their own rights in case of injury.

Held, that the suit would not lie, as the order of the Municipality refusing permission was not an unreasonable one under the circumstances of the case.

Held, further, that the authority of the Municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

NÁGAR VALAB NARSI *v.* THE MUNICIPALITY OF DHANDHUKA... 490

MUNICIPALITY—*Municipal Act (Bom.), VI of* 1873, *Sec.* 36—*Orders under—Privy, power of Municipality to order to be built by owner of a house—Such order not imperative, but permissive—Construction.*] The terms of section 36 of Bombay Act VI of 1873 are not imperative in requiring a Municipality to call on the owner of a house to build a privy, but are permissive, leaving it to the discretion of the Municipality to determine when the power conferred on them shall be exercised.

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Accordingly, where the plaintiff complained that the defendants had erected a privy so close to his house as to be a nuisance and the lower Appellate Court found it to be as such, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the Municipality issued under section 31 of the Act,

Held, reversing the decree of the lower Appellate Court, that the Municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants, therefore, could not plead that they acted under the orders of the Municipality.

The High Court directed an injunction to remove the privy within three months from the date of its decision.

SAYAD JÁFIR SÁHEB *v.* SAYAD KÁDIR RAHIMAN 634

NUISANCE—*Public nuisance—Penal Code (Act XLV of 1860), Secs. 268 and 290—Annoyance to a particular religious sect—Private nuisance.*] The accused cut up, on his verandah, meat that was to be cooked for a dinner-party, exposing it to the sight of persons passing along the road, among whom were some Jains, whose temple was close by. The Jains complained to the Magistrate that the accused had made the air offensive, and caused annoyance. The Magistrate found that the meat was not in an offensive state, but convicted the accused of committing a public nuisance, under section 268 of the Indian Penal Code, on the ground that he had done an act by which several persons being Jains were much annoyed, it being a well-known fact that they had great repugnance to the killing of animals of every sort.

Held, reversing the conviction and sentence, that in this case no real damage or injury was caused to the public or to the people in general dwelling in the vicinity, and that it was a case of private rather than of public nuisance, and, therefore, not one falling within the purview of the criminal law. The applicant's act was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals, and did not constitute an offence under section 291 of the Indian Penal Code.

QUEEN-EMPRESS *v.* BYRAMJI EDALJI 437

PARTITION—*Khoja Mahomedans, law applicable to—Right of a son to obtain partition of ancestral property in his father's life-time without his father's consent—Distinction between ancestral and self-acquired property among Khojá Mahomedans—Custom, proof of—Practice—Evidence—Burden of proof.*] Amongst Khojá Mahomedans a son is entitled to obtain partition of ancestral estate in his father's life-time without his father's consent.

By the law and customs of Khojá Mahomedans there is a distinction between ancestral and self-acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law.

The presumptions of the Hindu law apply to Khojá Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. Therefore in a suit for partition brought by a son against his father who alleged that the customs and usages of the Khojá community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's life-time a partition of the property in the father's hands whether ancestral or self-acquired,

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Held, that the burden of proving the issues framed upon these allegations lay upon the defendant.

In considering the question of the alleged custom and usages the Court adhered to the less stringent rule of proof applied in *Hirábái* v. *Gorbái* (12 Bom. H. C. Rep. 294.)

In the same suit where the defendant having failed to establish the existence of the special custom and usages above mentioned, yet resisted the plaintiff's claim to partition on the ground that the property claimed was not ancestral,

Held that the *onus* was on the plaintiff, in the first instance, to give evidence that the property was ancestral. In such cases the amount of evidence required to shift upon the defendant the burden of displacing it depends on the circumstances of each case.

CÁSSUMBHOY AHMEDBHOY *v.* AHMEDBHOY HUBIBBHOY AND RAHIMBHOY ALLÁDINBHOY 280

PARTNERSHIP—*Contract—Illegal contract—Contract entered into in violation of the law—Illegal partnership—Right of partner to sue for a share—Contract Act* (*IX of* 1872), *Secs.* 23, 24—*A'bkári Act* (*Bombay Act V of* 1878), *Sec.* 45—*Breach of license—Penalty.*] A contract entered into for the purpose, or with the necessary effect, of defeating a statute will not be enforced or recognized by the Courts, at any rate where both parties stand *in pari delicto*.

A. and B. took a liquor contract from the Government. By the terms of their license they were forbidden to take a partner, and under section 45 of the Bombay Abkári Act (V of 1878) they were liable to a penalty of Rs. 100 for a breach of their license. C. entered into partnership with A. and B. with full knowledge of the conditions of the license, and afterwards filed a suit for an account of the partnership transactions.

Held, that C. was not entitled to any relief, having entered into the partnership in direct violation of the law.

HORMASJI MOTÁBHÁI *v.* PESTANJI DHANJIBHÁI 422

PENAL CODE (ACT XLV OF 1860), SECS. 52, 79, 99, AND 342—*Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bonâ fide under colour of his office—Act XIII of* 1856, *Sec.* 35—*Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code* (*Act X of* 1882), *Secs.* 54, 435, 439—*High Court's powers of revision.*] On the 29th December, 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A. M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujaráti marks, and not knowing that such marks are placed on English-made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts alleging that he had arrested the complainant because he had as-

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assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go.

The complainant then lodged a complaint before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement, offences punishable under sections 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession; and that the scuffle was caused solely by the action of the accused in treating the complainant, without any valid reason, as a suspected thief. The Magistrate convicted the accused of wrongful confinement under section 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment.

Held, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, satisfactory, he acted under a *bond-fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in section 52 of the Indian Penal Code (Act XLV of 1860). He was, therefore, protected by section 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under section 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was, therefore, legally arrested, under section 54, clause 5 of the Criminal Procedure Code (Act X of 1882), for obstructing a police officer while acting in the execution of his duty.

Held, also, that the High Court will exercise its powers under sections 435 and 439 in the interests of justice, in exceptional cases, as where the enquiry in the lower Court has been faulty.

BHÁWOO JIVÁJI *v.* MULJI DAYÁL 377

PENAL CODE (ACT XLV OF 1860), SEC. 175—*Production of document—Civil Procedure Code (Act XIV of 1882), Sec. 174—Court's jurisdiction to punish a witness for refusing to produce a document—Procedure—Criminal Procedure Code (Act X of 1882), Sec. 480.*

See CIVIL PROCEDURE CODE 63

—SECS. 268 AND 290—*Public nuisance—Annoyance to a particular religious sect—Private nuisance.*]

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The accused cut up, on his verandah, meat that was to be cooked for a dinner-party, exposing it to the sight of persons passing along the road among whom were some Jains, whose temple was close by. The Jains complained to the Magistrate that the accused had made the air offensive, and caused annoyance. The Magistrate found that the meat was not in an offensive state, but convicted the accused of committing a public nuisance, under section 268 of the Indian Penal Code, on the ground that he had done an act by which several persons being Jains were much annoyed, it being a well-known fact that they had great repugnance to the killing of animals of every sort.

Held, reversing the conviction and sentence, that in this case no real damage or injury was caused to the public or to the people in general dwelling in the vicinity, and that it was a case of private rather than of public nuisance, and, therefore, not one falling within the purview of the criminal law. The applicant's act was an annoyance merely by reason of its hurting the feelings of the Jains, who have a repugnance to the killing of animals, and did not constitute an offence under section 291 of the Indian Penal Code.

QUEEN-EMPRESS *v.* BYRAMJI EDALJI 437

PENALTY—*Bond—Stipulation to pay double the amount of debt on default of payment of any instalment.*] A stipulation by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, *held* to be in the nature of a penalty.

JOSHI KÁLIDÁS *v.* DÁDÁ ABHESANG 555

PLEADER—*Professional conduct—Civil Procedure Code (Act XIV of 1882), Sec.* 617.] Section 617 of the Code of Civil Procedure (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit, or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties.

A pleader was fined Rs. 25 by a Second Class Subordinate Judge for refusing to act on behálf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the enquiry into the pleader's professional conduct was of a disciplinary, and not litigious, character. The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious. In such an inquiry no reference could properly be made, under section 617 of Act XIV of 1882.

YASHVANT NÁRÁYAN ADARKAR *v.* XAVIER J. J. V. DESOUZA. ... 78

PLEADER AND CLIENT, COSTS BETWEEN—*Act I of* 1846, *Sec.* 6—*Quantum meruit.*] In a suit brought by R. in *formâ pauperis* against the defendant he had engaged the services of the plaintiff as his pleader, but no express agreement for the remuneration of the plaintiff was made. The suit was numbered, and, after the evidence on either side had been gone into, the trying Court made an order dispaupering R. On an application by R., who offered to pay the court-fees, the High Court under its extraordinary jurisdiction made an order directing the lower Court to receive the fees and to proceed with the suit. R. paid the fees, but the suit was compromised. The plaintiff did not attend to the suit after remand. The plaintiff having sued the defendant for his fees,

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the Subordinate Judge was of opinion that one-fourth fee under section 6 of Act I of 1846 should be awarded to the plaintiff. On reference to the High Court,

Held, that the plaintiff was entitled to a *quantum meruit*, which was to be determined with reference to all the circumstances of the case, there being no express agreement in the case.

KESHAV GOVIND JOSHI *v.* JAMSETJI CURSETJI 557

PLEADERS AND CLIENTS, THEIR RIGHTS AND OBLIGATIONS *inter se* —*Regulation II of* 1827—*Confidential communications made in the course of professional employment.*] The rules prevailing in England with regard to the rights and obligations of solicitors in relation to their clients apply, with slight difference, to pleaders practising in India. The principles deducible from the English cases are as follows :—

1. A party to a judicial proceeding is entitled to such professional assistance as he thinks will best suit him.

2. A pleader is free to place his services at the disposal of any such party upon such terms as he may think most advantageous to himself consistently with the honour of his profession and the due administration of justice.

3. A pleader who receives any confidential information from his client in the course of his professional employment is not at liberty to carry that information into the service of his antagonist, or any one who in that very litigation or in any subsequent litigation may be opposed to the client furnishing the information.

4. Under Regulation II of of 1827 pleaders receive certain fees, in return for which they are not at liberty to act against those retaining them whether they are retained by one client singly or by two or more clients jointly.

A pleader who has acted for several persons will not be restrained from afterwards acting for some of them only as against the others unless it be shown that he is possessed of knowledge arising from his previous employment which might be prejudicial to his other clients.

As a general rule, the Court will require a very strong case to be made out before it will interfere by way of injunction, restraining a pleader from appearing for a client, and there must be clear affidavits made to show that special knowledge was acquired by the pleader during his employment by the former client. In case of his possessing such knowledge he will not be allowed to throw up the conduct of the case and transfer his services. He will never be allowed to discharge himself from the conduct of the case if the case raises even a probability of prejudice to his former employers.

K., a pleader, was at first retained by P. and N. jointly to defend a suit on their behalf. At a later stage of the case, P. and N. quarrelled. Thereupon K. applied to the Court for leave to withdraw from the conduct of the case, on the ground that he could not attend to the interests of both P. and N. The Court allowed him to withdraw. A few days afterwards, K. appeared in Court, and filed a *vakalatnáma*, or warrant of attorney, signed by N., and claimed to conduct the case on behalf of N. alone. P. objected to this ; but the Court disallowed this objection.

Thereupon, P. made an application to the High Court for an injunction restraining K. from acting on behalf of N. alone.

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Held, that as it was not made out that K. was in possession of any confidential information either from P. or from P. and N. together, such as would give him an unfair advantage when acting on behalf of N., the Court would not interfere or restrain K. from serving N. alone.

Held, further, that a pleader in such circumstances should take the direction of the Court as to which of two or more clients he is to serve, and as to the disposal of the fees he has received from them jointly.

PÁLLONJI MERWÁNJI *v.* KALLÁBHÁI LALLUBHÁI 85

POLICE—*Penal Code* (*Act XLV of* 1860,) *Secs.* 52, 79, 99, *and* 342—*Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bonâ fide under colour of his office—Act XIII of* 1856, *Sec.* 35—*Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code* (*Act X of* 1882), *Secs.* 54, 435, 439—*High Court's powers of revision.*] On the 29th December, 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M. he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujaráti marks, and not knowing that such marks are placed on English-made goods, concluded that this statement was false, and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts, alleging that he had arrested the complainant, because he had assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go.

The complainant then lodged a complaint before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement, offences punishable under sections 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession; and that the scuffle was caused solely by the action of the accused in treating the complainant, without any valid reason, as a suspected thief. The Magistrate convicted the accused of wrongful confinement under section 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment.

Held, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers to which might clear away his suspicions, and having

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received answers which were not, in his opinion, satisfactory, he acted under a *bond-fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in section 52 of the Indian Penal Code (Act XLV of 1860). He was, therefore, protected by section 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under section 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was, therefore, legally arrested, under section 54, clause *b* of the Criminal Procedure Code (Act X of 1882), for obstructing a police officer while acting in the execution of his duty.

Held, also, that the High Court will exercise its powers under sections 435 and 439 in the interests of justice, in exceptional cases, as where the enquiry in the lower Court has been faulty.

BHÁWOO JIVÁJI *v.* MULJI DAYÁL 377

POSSESSION—*Manager of a Hindu temple—Shevaks or servants of an idol—Their rights inter se.*] The plaintiff was the hereditary manager of the temple of Shri Ranchord Ráiji at Dákor. The defendants were the *shevaks* or ministers of the deity. The plaintiff sued to oust the defendants from a certain piece of land attached to the temple, alleging that the defendants had erected shops on the land, and appropriated the rents to their own use, although it had been already decided in a suit between the parties that the land was always to be kept open and unoccupied for the use of the temple. The *shevaks* contended that they had been in exclusive and uninterrupted possession of the land in dispute for more than twelve years, and that by reason of such user they had acquired a *quasi* proprietary title at least as against the manager of the temple. They, therefore, pleaded that the suit was barred by limitation.

Held that the defendants had not by occupation and user acquired any title as against the plaintiff, who was the manager of the temple estate. They had come into occupation originally as servants and representatives of the deity, and during their occupation they could not by a wish change the nature of their possession. Both they and the plaintiff held the land for the same deity and their rights could not be adverse to each other so as to give rise to a title by prescription. The only question then was as to which of them was the proper representative of the deity for the particular purpose of this suit, and that question had already been decided in a former suit in favour of the plaintiff.

MULJI BHULÁBHÁI *v.* MANOHAR GANESH 322

PRACTICE—*Application to put in evidence in appeal which applicant refused to produce at first hearing.*] The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The

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defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce.

Held, that the evidence could not be admitted.

MANOHAR GANESH TÁMBEKAR *v.* LAKHIMIRÁM GOVINDRÁM ... 247

PRACTICE—*Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 545, 244, *Cl.* (3), 588 *and* 2—*Appeal—Order rejecting stay of execution appealable.*] An order by a District Judge, under section 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution is a decree as defined in section 2, and is, therefore, appealable.

MUSÁJI ABDULLA *v.* DÁMODARDÁS 279

———*Hindu law—Joint family—Manager—Parties to suit—Suit by manager alone—Co-parceners made parties on objection by defendant—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 30—*Amendment of pleadings—Plaint amended in second appeal by adding parties.*] The plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle, who were his undivided co-parceners, should be made parties to the suit. The Court of first instance held that the plaintiff, as manager, could sue alone, and passed a decree for the plaintiff. The first appellate Court reversed the decree, holding that the plaintiff could not sue alone, except under the provisions of section 30 of the Civil Procedure Code, which had not been complied with. On second appeal to the High Court,

Held, that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co-plaintiffs or as defendants. The right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, and, therefore, the defendant is always entitled in such suits, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record, to ensure him against the possibility of the plaintiff's acting without authority.

The plaintiff was allowed on second appeal to amend his plaint by making the other members of the family parties to the suit.

HARI GOPÁL *v.* GOKALDÁS KUSHABÁSHET 1

———*Hindu law—Will—Hindu Wills Act* (*XXI of* 1870)—*Indian Succession Act X of* 1865, *Sec.* 179—*Probate and Administration Act* (*V of* 1881), *Sec.* 4—*Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will, effect of—Representation of the estate—Parties to sue.*

See WILL 621

———*Minor, suit against—Názir appointed guardian at litem—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code* (*Act XIV of* 1882), *Sec.* 458—*Procedure.*] There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Názir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may

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refuse to go on with the suit if it should be of opinion that the Názir has been unavoidably prevented from making himself acquainted with the case against the minor.

In a suit against a minor residing in a Native State at a distance from the Názir of the Court, who was appointed guardian *ad litem*, and the Názir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay,

Held, that the Court, if it chose, might cancel the appointment of the Názir as guardian *ad litem* under section 458 of the Civil Procedure Code (Act XIV of 1882).

NÁRÁYANDÁS RÁMDÁS *v.* SÁHEB HUSKIN 553

PRACTICE—*Parties—Suit originally against owners—Amendment of plaint—Ship added as party defendant.*] In a suit for collision originally filed against the owners of a ship,

Held, that the plaintiffs might amend the plaint by adding the ship as a party defendant.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, *v.* MESSRS. SHEPHERD AND HÁJI ISMÁIL HOSSEIN ... 237

———*Preliminary issue—Right to begin—Two counsel heard in argument of preliminary issue.*] At the hearing of a case on a preliminary issue the defendant, by whom the issue is raised, has the right to begin.

Two counsel for the same party may be heard in argument of a preliminary issue.

FÁTMÁBÁI *v.* AISHÁBÁI 454

———*Presidency Small Cause Courts Act XV of* 1882, *Secs.* 38 *and* 71—*Re-hearing, application for—Compliance with requirements of Act subsequently to application for re-hearing—Rule of Court No.* 208.] An application to the High Court for a re-hearing under section 38 of the Presidency Small Cause Courts Act XV of 1882 must be in writing.

A decree was passed against the petitioner by the Court of Small Causes on the 9th December, 1887. On the 16th December, counsel on his behalf was instructed to apply to the High Court, under section 38 of Act XV of 1882, for a re-hearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section, which requires the application to be made within eight days, their Lordships before rising allowed the application to be then formally made, but adjourned the hearing to a subsequent day. When the case came on, it appeared (1) that the petition had not been signed and declared until the 17th December 1887, (*i.e.* the day after the application had been made in Court); (2) that the affidavit in support of the application as required by section 38, had not been filed until two days after the application in Court; and (3) that the court-fees which by section 71 of Act XV of 1882 should be paid prior to the application had not been paid until the 20th December 1887, *i.e.* four days after the application.

Held, that the application for a re-hearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the

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requirements of the Act could not place him in a better position than he occupied when the application was made.

IN RE JAIKISSONDÁS PURSHOTAMDÁS 408

PRACTICE—*Re-hearing—Small Cause Courts Act XV of* 1882, *Sec.* 38—*Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence.*] On an application for a re-hearing by the High Court, under section 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court,

Held by the High Court that the evidence being of a very conflicting character, and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused.

Section 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed the inclination of opinion.

HASSANBHOY VISRÁM *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED 579

———*Review of judgment—No appeal from order granting review—Civil Procedure Code (Act XIV of* 1882), *Sec.* 629.] No appeal lies from an order granting a review of judgment, except in the cases set forth in section 629 of the Civil Procedure Code (Act XIV of 1882).

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, *v.* THE S. S. "ZUARI" 171

———*Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Res judicata—Objection taken at hearing that the application made to Court was not the application of which notice had been given to opposite party—Preliminary point.*

See SPECIFIC PERFORMANCE 174

PRINCIPAL AND AGENT—*Recognized agent—Civil Procedure Code (Act XIV of* 1882), *Sec.* 37—*Agent's right to execute decree obtained by him as agent—Waiver—Execution of decree.*] P. filed a suit in the Scond Class Subordinate Judge's Court at Máhád. As P. resided at Thána, outside the jurisdiction of the Court of Máhád, she authorized her agent, under a general power of attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in P.'s favour. The agent then sought to execute the decree. The Court at Máhád passed an order upon his *darkhást* granting only partial execution. Against this order the agent filed an appeal in the District Court at Thána. Then, for the first time, the judgment-debtors challenged the agent's right to represent P., who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed.

Held, that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been

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taken to the agent's right to represent P. at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation.

PÁRVATIBÁI *v.* VINÁYEK I'ÁNDURANG 68

PROBATE, NATURE AND EFFECT OF—*Will—Letters of administration—Citation—Defective citation—Revocation of letters of administration—Act V of* 1861, *Secs.* 16 *and* 50.

See WILL 104

———*Will—Hindu Wills Act (XXI of* 1870*)—Indian Succession Act (X of* 1865*), Sec.* 179*—Probate and Administration Act (V of* 1881*), Sec.* 4*—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will—Effect of—Representation of the estate—Parties to sue—Practice—Hindu law.*

See WILL 621

REGISTRATION ACT III OF 1877, SEC. 50—*Priority—Possession of mortgagor as tenant to mortgagee—No notice to bonâ-fide purchaser—Notice.*] By an unregistered deed of sale dated the 1st June, 1881, the first defendant sold to the plaintiff for Rs. 90, certain land which had been previously mortgaged with possession by him to the plaintiff. The first defendant had remained in possession subsequently to the mortgage as the tenant of the plaintiff under a lease which was not registered. On the 16th April, 1883, the first defendant sold the property to defendant No. 2, who registered his deed, took actual possession of the land, and got it transferred to his name in the revenue books. The plaintiff now sued to recover possession from defendant No. 2, who contended *(inter alia)* that his deed being registered was preferable to the plaintiff's prior, but unregistered, deed of sale. The Court of first instance awarded the plaintiff's claim. The defendants appealed to the District Judge, who reversed the lower Court's decree. On appeal by the plaintiff to the High Court,

Held, confirming the decree of the lower Appellate Court, that defendant No. 2 having registered his deed of the 16th April, 1883, was entitled, under section 50 of Act III of 1877, in priority to the plaintiff, whose deeds were not registered, although earlier in date.

It was contended for the plaintiff that the possession of the defendant No. 1 as tenant to the plaintiff subsequently to the mortgage and sale of the land to the plaintiff was the possession of the plaintiff, and that such possession operated as constructive notice of the plaintiff's title to defendant No. 2.

Held, that the possession by defendant No. 1 as mortgagor was not notice to defendant No. 2 of the plaintiff's title. Defendant No. 1 being the vendor of the land to defendant No. 2, the latter could have no reason to suppose that he was in possession otherwise than as owner.

MORESHVAR BÁLKRISHNA *v.* DATTU 569

RES JUDICATA—Decree—Specific performance—Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Practice—Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point.

See SPECIFIC PERFORMANCE 174

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RES JUDICATA—Suit by a woman for a share of property alleging herself to be A.'s widow—Prayer for declaration of her marriage to A.—Denial of her marriage to A. by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (XIV of 1882), Sec. 13—Practice—Preliminary issue—Right to begin—Two counsel heard in argument of preliminary issue.] The plaintiff Fátmábái in this suit alleged that both she and the defendant had been the wives of one Háji A'dam Háji Ismáil, a Cutchi Memon Mahomedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambái. Both plaintiff and defendant had since Háji A'dam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishábái had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fátmábái and her daughter Mariambái filed a suit (No. 227 of 1882) against the present defendant Aishábái, claiming a share of the estate of her deceased husband Háji A'dam. In that suit she alleged that she had been lawfully married to Háji A'dam, and had ever since cohabited with him, and that her child Mariambái was his legitimate daughter; and she prayed *(inter alia)* for a declaration that she was the lawful wife and that Mariambái was the lawful daughter of Háji A'dam. In the written statement filed by Aishábái in that suit she alleged that Fátmábái was not the lawful wife of Háji A'dam, but only his kept mistress, and she denied that Fátmábái was entitled to share in his property.

On the 3rd May, 1882, an order of reference was made, by which both the above suits, *viz.* No. 616 of 1879 and No. 227 of 1882, "and all matter in difference thereon" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and awards in Suit No. 227 of 1882 Fátmábái was to be paid by Aishábái a sum of Rs. 55,000 in full satisfaction of all the claims of Fátmábái and her daughter Mariambái upon the estate of Háji A'dam, the rest of the estate being declared the sole property of Aishábái. The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award * * * and doth order that the said Aishábái do pay for the said Fátmábái to her attorneys, Messrs. Tyabji and Dáyábhái, within seven days after the date of his decree, the sum of Rs. 55,000 *in full settlement of all and singular the claims and claim of the said Fátmábái and Mariambái or either of them against or upon the estate of the said Háji A'dam Háji Ismáil whatsoever and wheresoever* * * *and doth declare* that upon the payment of the said sum of Rs. 55,000 by the said Aishábái to the said Fátmábái as aforesaid, *all claims whatsoever* of the said Fátmábái and Mariambái or either of them upon the estate of the said Háji A'dam Háji Ismáil, in the hands of any person whatsoever or upon the said Aishábái as heir of the said Háji A'dam Háji Ismáil *personally or otherwise howsoever, shall be considered to have been fully satisfied* by the said *Aishábái and absolutely waived for ever by the said Fátmábái and Mariambái*; and doth further declare *that the said Aishábái is entitled absolutely* to all the rest of the estate and effects of the said Háji A'dam Háji Ismáil as her sole property as against the said Fátmábái and Mariambái."

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The defendant Aishábái in 1882 also filed another suit (No. 198 of 1882) against her father-in-law's executors, and recovered certain ornaments which she alleged to be her *stridhan*.

In October, 1886, Aishábái married again; and in December, 1887, Fátmábái filed the present suit against her, alleging that by the law and custom of Cutchi Memons Aishábái had by reason of such second marriage forfeited all rights and interests to and in the property of her first husband Háji A'dam, and also to the ornaments which she had recovered in the last mentioned suit, and she claimed that the said property and ornaments now belonged to her (Fátmábái) as sole surviving widow of the said Háji A'dam. She prayed for a declaration that Aishábái had by her second marriage forfeited her right to the said property and ornaments, and that she (the plaintiff) was now entitled thereto; that the defendant might be ordered to deliver, &c., &c.

The defendant Aishábái filed a written statement in which *(inter alia)* she contended that the plaintiff was never the wife of Háji A'dam, but had been merely his kept mistress; that in Suit No. 227 of 1882 she (the defendant) had denied that the plaintiff Fátmábái was the widow of Háji A'dam; that the award and decree in that suit were not made upon the basis of her (Fátmábái's) being such widow, and she (the defendant) submitted that the said award and decree were a bar to the present suit. It was contended for the defendant (1) that the plaintiff had in the former suit prayed for a declaration that she had been the lawful wife of Háji A'dam; that the decree in that suit contained no such declaration, and that her prayer must, therefore, be taken to have been refused under section 13 of the Civil Procedure Code (XIV of 1882), and that she was consequently not now entitled to sue as his widow—her claim to be his widow being *res judicata*; (2) that the decree in Suit No. 227 of 1882 expressly declared that the Rs. 55,000 awarded to the plaintiff by that decree was in full settlement of all her claim; and that she was, therefore, precluded from claiming against the estate in any possible contingency; and that, therefore, the defendant's remarriage gave her no right to sue; (3) that the latter part of the decree amounted to a release and assignment by the plaintiff Fátmábái to the defendant of all her (the plaintiff's) right to the property in question.

Held (1) that the *status* of the plaintiff as widow of Háji A'dam was not *res judicata*. The question of the plaintiff's marriage with Háji A'dam had not been controverted before the arbitrators and finally decided in a manner sufficient to establish *res judicata*. An award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators; Explanation III of section 13 of the Civil Procedure Code (Act XIV of 1882) does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted.

(2) That the declaration in the former decree, that the Rs. 55,000 was paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The previous suit was brought by Fátmábái as widow against Aishábái *as widow*. The present suit was brought by Fátmábái as widow against Aishábái remarried, The ground relied upon in the present suit was a new ground not

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known and not in existence at the time of the former suit, *viz.*, that Aishábái was no longer a widow, and had, therefore, lost all legal right to the estate of her late husband. There was not the necessary condition to establish an estoppel, *viz.*, *eadem causa petendi* and *eadem conditio personarum*.

(3) But that the award and release contained in the decree constituted a binding agreement, by which the plaintiff Fátmábái for the sum of Rs. 55,000 waived all her rights against Aishábái, including the claim made in the present suit, which existed at the time of the award as a present right dependent on a contingency, and the suit, therefore, should be dismissed.

At the hearing of a case on a preliminary issue the defendant, by whom the issue is raised, has the right to begin.

Two counsel for the same party may be heard in argument of a preliminary issue.

FÁTMÁBÁI *v.* AISHÁBÁI 454

RES JUDICATA—Mortgage—Clause of conditional sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee, but absolutely—Subsequent suit for redemption barred—Limitation Act XV of 1877, Sched. II, Art. 134—Landlord and tenant—Tenant denying landlord's title—Right of landlord to evict.] In 1863 Báláji and Gyanu mortgaged certain land to one Gopál under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of Gopál, the mortgagee.

In 1871 Gopál filed an ejectment suit agajnst Báláji and Gyanu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsoquently let it to Hari, who now, in collusion with the other two defendants (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopál's title as owner as against the mortgagors, Báláji and Gyanu, who claimed a right to redeem. A decree was passed in 1872 ordering Báláji and Gyanu to pay Rs. 100 to Gopál within one month, or, in default, to deliver up to him possession of the land. The money was not paid, and Vishnu, as purchaser from Gopál, got possession in execution of the above decree in August, 1873.

In September, 1885, the plaintiff, as Báláji's heir and legal representative, filed a suit against Gopál and Vishnu to redeem the property. The Court of first instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. In appeal, the Court reversed this decision and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant Vishnu then applied to the High Court under its extraordinary jurisdiction.

Held, that the plaintiff's claim was *res judicata*. In the suit brought by Gopál, (the mortgagee), in 1871 he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them, by way of indulgence, one month within which to regain the land by payment of Rs. 100 to Gopál.

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It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished After the lapse of the month, Gopál could not have recovered the Rs. 100. Had he sought to recover that money he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed.

Held, also, that the suit was barred under article 134 of Schedule II of the Limitation Act (XV of 1877)—Vishnu having purchased the land for value from Gopál, the ostensible owner, more than twelve years before suit.

A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord.

VISHNU CHINTÁMAN *v.* BÁLÁJI BIN RÁGHUJI 352

REVIEW OF JUDGMENT—*Practice—No appeal from order granting review—Civil Procedure Code (Act XIV of* 1882), *Sec.* 629.] No appeal lies from an order granting a review of judgment, except in the cases set forth in Section 629 of the Civil Procedure Code (Act XIV of 1882).

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED, *v.* THE S. S. "ZUARI" 171

REVISION—*Limitation—High Court's revisional powers—Civil Procedure Code (XIV of* 1882), *Sec.* 622—*Material irregularity.*] On the 29th November, 1886, this suit was filed on a bond dated 29th November, 1881, payable in two years.

The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November, 1883.

Against this decision the plaintiff applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Held, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November, 1883,—that is, the day of the month corresponding with the day on which the bond was dated.

Held, further, that the decision of the Subordinate Judge being palpably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under section 622 of the Code of Civil Procedure (Act XIV of 1882).

Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible there is no remedy under section 622 of the Code or under the provisions of section 15 of Statute 24 & 25 Vic., c. 104, whatever remedy there may be, in the Bombay Presidency, under clause 2 of section 5 of Regulation II of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on its determination of that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction.

VENKUBÁI *v.* LAKSHMAN VENKOBA KHOT 617

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SALE OF GOODS—*Contract—Non-acceptance of goods—Contract for goods to be ordered from Europe—Such contract not fulfilled by offer of goods of same description not ordered out for purchasers, but bought by vendors in Bombay.*

See CONTRACT 50

SANCTION TO PROSECUTE—*Criminal Procedure Code (Act X of 1882), Sec. 195—Sub-Registrar—Forgery—Indian Penal Code (Act XLV of 1860), Secs. 463, 467—Court—Judicial inquiry—Administrative inquiry.*] A Sub-Registrar under the Registration Act (III of 1877) is not a Judge and, therefore, not a 'Court' within the meaning of section 195 of the Code of Criminal Procedure (Act X of 1882). His sanction is, therefore, not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office.

The word 'Forgery' is used as a general term in section 463 of the Indian Penal Code (Act XLV of 1860); and that section is referred to in a comprehensive sense in section 195 of the Criminal Procedure Code (Act X of 1882) so as to embrace all species of forgery, and thus includes a case falling under section 467 of the Indian Penal Code.

The definition of "Court" given in the Evidence Act (I of 1872) is framed only for the purposes of the Act itself, and should not be extended beyond its legitimate scope.

Distinction between a *judicial* and an *administrative* inquiry pointed out.

QUEEN-EMPRESS *v.* TULJÁ ... ...

SMALL CAUSE COURT—*Jurisdiction—Gift—Incomplete gift—Suit by executor to recover promissory notes on ground that the gift of them to defendant was incomplete—Act XV of 1882, Sec. 18.*] The plaintiff as executor of D. sued the defendant in the Small Cause Court of Bombay to recover two Government promissory notes, of the nominal value of Rs. 2,000, standing in the name of D. The defendant, who had been D.'s servant, alleged that the notes had been given to him by D. as a reward for past services. The Court held that there was evidence (though unsatisfactory) of a gift by D. to the defendant. It was then contended, on behalf of the plaintiff, that, assuming there was evidence of a gift, such gift was incomplete, inasmuch as the notes had not been endorsed to the defendant, and that the defendant was not entitled to any aid from the Court to perfect the gift. The Judge held that the Court of Small Causes had no power to decree the return of the notes or payment of their value, and that so far as the jurisdiction of that Court was concerned, the defendant had a right to retain the notes.

Held by the High Court, that the Court of Small Causes had jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift of the notes to the defendant, and that it might on that ground pass a decree in favour of the plaintiff for the return of the notes or payment of the value.

KHURSEDJI RUSTOMJI COLÁH *v.* PESTONJI COWASJI BUDHÁ ... 573

——— ——— COURTS ACT (PRESIDENCY) XV OF 1882, SEC. 38—*Re-hearing—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice.*] On an application for a re-hearing by the High Court, under section 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court,

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Held by the High Court, that the evidence being of a very conflicting character, and not such as to to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused.

Section 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed the inclination of opinion.

HASSANBHOY VISRÁM *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED 579

SMALL CAUSE COURTS ACT (PRESIDENCY) XV OF 1882, SECS. 38 AND 71—*Rehearing, application for—Compliance with requirements of Act subsequently to application for rehearing—Rule of Court No.* 208.] An application to the High Court for a rehearing under section 38 of the Presidency Small Cause Courts Act XV of 1882 must be in writing.

A decree was passed against the petitioner by the Court of Small Causes on the 9th December, 1887. On the 16th December counsel on his behalf was instructed to apply to the High Court, under section 38 of Act XV of 1882, for a rehearing of the suit. The Court was then engaged in hearing appeals; but, in order to prevent the petitioner's application from being barred by limitation under the provisions of the section, which requires the application to be made within eight days, their Lordships before rising allowed the application to be then *formally made*, but adjourned the hearing to a subsequent day. When the case came on, it appeared (1) that the petition had not been signed and declared until the 17th December, 1887, (*i.e.* the day after the application had been made in Court); (2) that the affidavit in support of the application, as required by section 38, had not been filed until two days after the application in Court; and (3) that the Court fees which by section 71 of Act XV of 1882 should be paid prior to the application had not been paid until the 20th December, 1887, *i.e.* four days after the application.

Held, that the application for a rehearing must be rejected. The application, although nominally made on the 16th December, was only provisionally received, and every objection to its reception which could have been taken on that day could be taken at the hearing. The subsequent compliance by the petitioner with the requirements of the Act could not place him in a better position than he occupied when the application was made.

IN *RE* JAIKISSONDÁS PURSHOTAMDÁS 408

SPECIFIC PERFORMANCE—*Decree in favour of plaintiff—Rectification of decree on application of defendant—Motion to set aside decree dismissed—Subsequent application to rectify decree—Res judicata—Practice—Objection taken at hearing that application made to Court was not the application of which notice had been given to opposite party—Preliminary point.*] The plaintiffs sued in 1877 for specific performance of an agreement, dated 27th September, 1871, by which certain landed properties were to be divided, as specified in the agreement, between them and the defendants. The case came on for hearing on the 13th September, 1878. The defendants did not appear, and a decree *ex parte* was made, which declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, and referred the suit to the Commis-

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sioner for the preparation of conveyances, &c. The decree was sealed on the 9th October, 1878. No further steps were taken by any of the parties for six years, and in September, 1884, the matter was first brought before the Commissioner. He then directed the defendants to lodge with him all the title-deeds of the properties which by the agreement were to go to the plaintiffs as their share. The defendants thereupon applied that the plaintiffs should be directed to lodge the title-deeds of the properties which by the agreement were to go to them, but the Commissioner refused to make this order, being of opinion that he was not authorized to do so under the decree, which contained no direction to him in respect thereof. The defendants on the 10th November, 1884, gave notice to the plaintiffs, that they would apply to the Court—(1) "to set aside or vary its order of the 13th September, 1878, so far as it related to the lodging of title-deeds, &c.; (2) to appoint a receiver of certain properties mentioned in the agreement; (3) to order the plaintiffs to deliver up to the defendants the properties which belonged to their share under the agreement; (4) to order certain accounts to be taken." This motion was not brought on until the 10th September, 1885, on which day it was dismissed with costs; the Judge holding that the defendants had not shown sufficient cause to justify the setting aside of the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs having still kept possession of certain of the properties which by the agreement were to go to the defendants, notice was given by the defendants to the plaintiffs on the 28th April, 1887, that they would apply to the Court for an order that the plaintiffs should perform their part of the agreement of the 27th September, 1871, so far as it remained unperformed by them, by giving up to the defendants possession of certain properties, and by accounting for the rents thereof, &c., &c. At the hearing of this motion, counsel for the defendants asked that the decree should be rectified, by directing that the agreement should be specifically performed by the plaintiffs and defendants respectively. The defendants contended that the application was barred by lapse of time, and that the question was *res judicata* by the order of the 10th September, 1885.

Held, that the defendants were entitled to have the decree rectified. The fact that the decree declared that the plaintiffs were entitled to have the agreement of the 27th September, 1871, specifically performed, implied an order for specific performance of that agreement by all the parties to it. The mandatory words, however, *as* against the plaintiffs having been, in the first instance, omitted, might now be inserted in the decree, so as to put the decree into the ordinary and usual form of decree in cases of this nature. The Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them.

Held, also, that the motion was not *res judicata* by reason of the previous order of the 10th September, 1885. Although the notice of motion then served by the defendants on the plaintiffs included matters in respect of which the defendants sought relief by their present application, the Judge in making the order dealt with them as ancillary to the first and main point raised in that motion, *viz.*, the defendants' right to set aside the decree under section 108 of the Civil Procedure Code (Act XIV of 1882). Having decided that point against them, he did not really consider the other points at all, and did not adjudicate upon them, and, therefore, the present application in respect of those matters was not *res judicata*.

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Counsel for the plaintiffs contended that the defendants were not entitled, on the present motion, to ask for a rectification of the decree, inasmuch as their notice of motion did not intimate that the point would be raised.

Held, that such an objection ought to be taken at once as a preliminary point. As it was not made until the argument of counsel for the defendants was concluded, it should be taken that the form of the motion as made to the Court was acquiesced in. The objection was then too late.

KARIM MAHOMED JAMÁL *v.* RAJOOMÁ 174

SPECIFIC PERFORMANCE—*Suit by vendee against vendor—Delay of vendee in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.*] On the 26th February, 1886, the defendant purchased a house from C. for Rs. 4,500 and paid C. a considerable portion of the purchase-money. Before the transaction was completed, and the conveyance executed, the defendant, on the 23rd June, 1886, by an agreement, in writing, of that date, agreed to sell the house to the plaintiff at an advanced price of Rs. 4,800. The defendant was anxious that the sale should be completed in a short time, as the draft of the conveyance by C. to himself had been prepared, though not finally approved, and the house was in bad repair and in a somewhat dangerous condition. He had applied to the Municipality for leave to repair the house, and the monsoon season had begun. Ultimately it was agreed between him and the plaintiff that the plaintiff should complete the purchase within twelve days from the date of the agreement (23rd June, 1886), and this was duly inserted in the agreement. During the twelve days the plaintiff took no steps to have his conveyance prepared, but asked the defendant for a month's time to complete, saying that he had not the money with him. After some hesitation the defendant extended the time to the 10th August. On the 21st July, at latest, the drafts of the conveyance from C. to the defendant were formally and finally approved, and the defendant was anxious to complete the sale to the plaintiff. On the 23rd July he wrote to the plaintiff, reminding him that the time to complete would expire on the 9th or 10th of August, and requesting him to be prepared then to complete the purchase; otherwise he would consider the agreement of the 23rd June to be null and void, and would himself begin to repair the house. The plaintiff sent no reply to this letter, but at an interview with the defendant told him that he was considering the matter. He, however, took no steps in the matter beyond getting a draft conveyance prepared. The deed of conveyance by C. to the defendant was ready for execution on the 23rd August. Matters remained in this state until September. On the 7th September the defendant, through his solicitors, served a notice on the plaintiff, requiring him to carry out the agreement of the 23rd June, and giving him notice, that, in default of compliance within four days, he would consider the agreement at an end. The four days having expired without the plaintiff sending a reply or taking any steps to complete, the defendant considered his contract with the plaintiff to be at an end, and on the 13th September he completed his purchase from C. without reference to the plaintiff. If the plaintiff had been ready to complete the purchase, the conveyance to him by the defendant and the conveyance by C. to the defendant would have been executed simultaneously. Immediately after taking the conveyance from C., the defendant began to repair the house. When

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the repairs were almost complete, the plaintiff on the 5th October, 1886, sent a notice to the defendant requiring him to specifically perform the agreement of the 23rd June, 1886. The defendant refused, and the plaintiff filed this suit for specific performance.

Held, on the evidence, that the delay in completing the purchase was the delay of the plaintiff, and not of the defendant.

Held, also, that, having regard to the circumstances under which the contract with the plaintiff was made and to the nature of the property, the time stipulated for the completion of the purchase was of the essence of the contract, and that the extension of time granted at the plaintiff's request to the 10th August operated only as a waiver to the extent of substituting the extended time for the original time, and did not destroy the essentiality of the time. The defendant's letter of the 24th July was but a timely warning to the plaintiff, that the contract would not be kept in suspense after the extended time had expired. The plaintiff though thus warned took no steps to complete, and was not, therefore, in a position to enforce performance from the defendant after the 10th August had gone by.

It was contended for the plaintiff that the letter of the 7th September, written by the defendant's solicitors, treated the contract as then still subsisting, and purported to put an end to it if not completed within four days; that the time so allowed was unreasonable; that the defendant, in fact, by that letter waived the plaintiff's previous default, and gave the plaintiff a fresh starting point.

Held, that such was not the effect of the letter. The letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete within four days. That condition not having been complied with, the waiver could not be relied on.

Quære—Whether under all the circumstances of the case, and assuming time not to have been originally of the essence of the contract, the four days' time limited by that letter was unreasonable.

HÁJI FAKIR MAHOMED *v.* SHAIK ABDULLÁ 658

STAMP ACT I OF 1879, SEC. 34, PROV. I—*Suit on an unstamped promissory note—Evidence Act I of* 1872, *Secs.* 65, *Cl.* (*b*), *and* 91.] The plaintiff sued to recover from the defendant the balance of a debt due on an unstamped note passed to him by the defendant for consideration of Rs. 38. The note recited that the defendant had received the amount, and would repay it after three months from the date of its execution. The defendant admitted, by his written statement, execution of the note and the receipt of Rs. 37 in the shape of paddy, but alleged that he had paid off the debt. He also contended that the note being unstamped could not be admitted in evidence. The plaintiff contended that the note was a bond, and could be admitted on payment of the stamp duty and the penalty, under section 34 of the Stamp Act I of 1879, which he offered to pay. The Subordinate Judge was of opinion that the note in question was a promissory note, but that the defendant's admission of the consideration enabled the plaintiff to sue, although the note itself was inadmissible. On reference to the High Court,

Held per JARDINE, J., that the document sued on was a promissory note, and that the suit being brought on it as the original cause of action, the admission of its contents by the defendant did not avail the plaintiff, the document itself being inadmissible for want of a stamp.

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Held per BIRDWOOD, J., that the plaintiff could not recover irrespectively of the promissory note, as he did not seek to prove the consideration otherwise than by the note, which was inadmissible in evidence. The admission contained in the defendant's written statement did not amount to an admission of the claim as for money lent. The case was one in which no secondary evidence under section 65, cl. (*b*), of Act I of 1872 was admissible, the primary evidence, the document itself, being forthcoming. The plaintiff not having offered any independent evidence of the advance alleged by him, and the defendant not having admitted by his written statement that any money was lent to him, as alleged by the plaintiff, but having set up an entirely different transaction, in respect of which he admitted no remaining liability, the plaintiff's suit should be rejected.

DÁMODAR JAGANNÁTH *v.* ATMÁRÁM BÁBÁJI 443

STAMP ACT I OF 1879, SCH. I, ART. 152—*Tax—Receipt for money paid as taxes—Municipality, receipt by, for house-tax exceeding twenty rupees—Receipt stamp necessary.*] A receipt by a municipality acknowledging payment of house-tax exceeding twenty rupees requires a receipt stamp under Schedule I, Art. 52 of Act I of 1879.

IN *RE* KARÁCHI MUNICIPALITY 103

———————, SCH. II, 1 (*b*)—*Construction.*] S., being desirous of obtaining copies of certain records in a suit in the Court of the Subordinate Judge of Sirsi, appeared before the názir and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative of one of the defendants in that suit, and needed the copies for the purpose of producing them in a suit filed against her in the Court at KÁRWÁR. The affidavit, together with a duly stamped application, was presented by her pleader to the District Judge, who, being of opinion that the affidavit should be on a stamped paper, referred the case to the High Court.

Held, that the affidavit was exempt from stamp duty, under Schedule II, 1 (*b*) of the Stamp Act I of 1879.

IN *RE* THE APPLICATION OF SRESHÁMMÁ 276

SURETY—*Stay of execution of decree appealed against on giving security—Surety for fulfilment of appellate decree—His liability—Mode of enforcing it—Civil Procedure Code (Act XIV of 1882), Secs. 253 and 583—Execution proceedings—Separate suit—Words "in an original suit" in Section 253 of Act XIV of 1882 superfluous.*] Under Act VIII of 1859 and the supplemental Act XXIII of 1861 the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. The present Code of Civil Procedure (Act XIV of 1882) makes no alteration in the law on this subject.

Reading section 253 with section 583 of Act XIV of 1882, it is clear that the Court has the power to proceed against a person who has become a surety under section 546, for the fulfilment of the decree in appeal, in the same way as against a surety who has become liable under section 253 to satisfy a decree of a Court of first instance.

The words "in an original suit" in section 253 may be treated as a superfluous expression.

VENKÁPÁ NÁIK *v.* BASLINGÁPÁ 411

SURETIES—*Right of surety to appeal—Extent of their liability—Attachment before judgment—Security under Section 484 of Civil Procedure*

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Code (XIV of 1882)—*Decree—Stay of execution by Appellate Court—Fresh security under Section* 545 *of Civil Procedure Code (XIV of* 1882)—*Liability of original sureties.*] A surety against whom a decree is sought to be enforced under section 253 of the Code of Civil Procedure (Act XIV of 1882) has a right of appealing against an order made in the execution proceedings.

A and B. became sureties, under section 484 of the Code of Civil Procedure (Act XIV of 1882), for the production of property attached before judgment by the Court of first instance. Under their surety-bonds they were bound, in default, "to pay to the said Court such sum as the said Court may adjudge against the said defendant." The Court of first instance passed a decree in the plaintiff's favour for Rs. 229-14-0. Against this decree both parties appealed to the District Court. In that Court the defendant obtained an order for stay of execution of the original decree on his furnishing security, under section 545, "for the due performance of such decree or order as may *ultimately* be binding on him." He accordingly gave fresh security. The Appellate Court passed a decree in plaintiff's favour for Rs. 800 and costs.

Thereupon the decree-holder sought to enforce the appellate decree against the sureties A. and B. under section 253 of the Civil Procedure Code. The sureties contended, first, that the original decree having merged in the appellate decree, they were not liable at all under their bond, which related only to the decree of the Court of first instance; secondly, that they were responsible only for so much as was by the original decree adjudged against the defendant; and, thirdly, that their original liability had been extinguished by reason of execution having been stayed without their assent by the Appellate Court on defendant's furnishing a fresh security.

Held, that the liability of the sureties could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. That and no other sum was such "as the said Court may adjudge against the said defendant." The security given to the Court of first instance was for the satisfaction of its decree—not the possible decree of a higher Court. If an appeal was made, it was left to the Appellate Court to regulate the terms on which it would take security for the execution of its own decree.

Held, also, that so soon as the decree of the Court of first instance was made, the liability of the sureties was fully incurred, and they were severally bound to place at the disposal of the said Court, when required, the property specified in their bond, or, in default, to pay such sum as the said Court should adjudge against the defendant. This liability having been incurred, was not extinguished by the fact that an appeal had been brought against the decree. If the amount adjudged by the decree was reduced in appeal, their liability would be diminished to a like extent; or, if the decree was reversed, their liability would be reduced to nothing, but their liability did not cease, because the decree of the first Court merged in that of the Appellate Court.

SHEK SULEMAN *v.* SHIVRÁM BHIKÁJI 77

TAKAIT MAHA'RA'J, OFFICE OF.

See HINDU LAW 331

TRUSTEES' AND MORTGAGEES' POWERS ACT XXVIII OF 1866, SEC. 43, POWERS OF COURT UNDER.] J. S., a Hindu, died in

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1865 possessed of a temple and of a piece of land near it which he bought in his lifetime. By his will he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879 the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of J. S., still unadministered. As administratrix she continued to apply the income of the said land as directed in the will. She now filed the present petition, alleging that the said income, which amounted to about Rs. 900 *per annum*, was insufficient to keep up the said charity. She stated that a sum of Rs. 12,600 was urgently required for certain purposes connected with the said charity, and that she had agreed, in September 1887, with one Ruttonji Bhikáji that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 *per mensem*. In October, 1887, however, her adopted son served her with a notice to desist from granting the said lease. She, therefore, presented this petition to the Court under section 43 of the Trustees' and Mortgagees' Powers Act XXVIII of 1866, praying (*a*) that she might be advised whether she had power to grant the said proposed lease; (*b*) that the said lease might be sanctioned or directed by the Court; and (*c*) that the Court might give such opinion, advice or direction in the premises as the Court might think fit.

Held, that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had power to grant it. The Court will not, under this section, advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings, &c.

Held, also, that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of amount, or as to the work to be done, the Court refused to give any opinion.

IN RE LAKSHMIBÁI 638

VALUATION OF SUIT FOR PURPOSES OF JURISDICTION—*Suit for account and for balance that may be found due—Appeal—Act XIV of* 1869, *Secs.* 8 *and* 26.] The plaintiffs sued for an account of all the business done by the defendants as their commission agents from 1854 to 1867, and prayed that whatever was found due might be awarded with interest.

The plaintiffs valued the relief sought approximately at Rs. 510, and this was the only valuation stated in the plaint. The suit was filed in the Court of a First Class Subordinate Judge, who rejected the plaintiffs claim. Against this decision the plaintiffs preferred an appeal to the High Court.

Held, that as the approximate amount of the claim was stated in the plaint to be Rs. 510, that must be taken to be the value of the subject-matter of the suit for purposes of jurisdiction. The appeal, therefore, lay under sections 8 and 26 of Act XIV of 1869, not to the High Court, but to the District Court. Under section 50 of the

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Code of Civil Procedure (Act XIV of 1882) if a plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits, while in a suit for the amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. As in the former instance the precise amount, so in the latter the approximate amount stated in the plaint must be taken to be the amount of value of the subject-matter of the suit for purposes of jurisdiction.

KHUSÁLCHAND MULCHAND *v.* NAGINDÁS MOTICHAND ... 675

VATAN DESHMUKHI—Grant of profits of such vatan in perpetuity —Hereditary gumástan—How far such grant valid after the death of the grantor—Limitation—Adverse possession—Decree, proceedings in execution of, against the original debtor—Such proceedings not binding upon persons not parties to them.] By a *sanad* duly executed on the 20th August, 1850, the plaintiffs' father, Yeshvantráv, who was a *vatandár deshmukh*, appointed the defendants and their heirs hereditary *vatani gumástás*, and granted, by way of remuneration for their services, Rs. 201 and a quantity of grain out of the annual *vatan* income in perpetuity. In consideration of certain sums obtained from the defendants, Yeshvantrav mortgaged the *vatan* property to the defendants, who subsequently sued Yeshvantráv upon the mortgage. That suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against Yeshvantráv. In 1859, execution of the decree was granted against Yeshvantráv. In 1864 the services connected with the *vatan* were discontinued by Government. In 1871 Yeshvantráv died. The defendants having kept the decree alive, sought in 1881 to execute the decree against the plaintiffs' eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue.

The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer entitled to the allowance under the *sanad*, and for an injunction restraining the defendants from the execution of the decree against the *vatan*. The defendants contended *(inter alia)* that the *sanad* could not be cancelled, Yeshvantráv having granted it as full owner; that the receipt, by the defendants, of the allowance had been adverse since 1864, when their services had ceased; and that the execution proceedings against the plaintiffs' father and their elder brother in 1859 and 1881, respectively, bound the plaintiffs. Both the lower Courts decided in favour of the plaintiffs. On appeal by the defendants to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the *vatan* was vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumástás*, nevertheless the remuneration attached to the office by Yeshvantráv was in derogation of his successor's rights, and was, therefore, at any rate in the absence of proof of custom, invalid against them.

Held, also, that, having regard to the terms of the *sanad*, it was in the power of the original grantor, or any of his successors, to determine the office and the remuneration at any time after the *vatan* services ceased in 1864.

Held, also, that, assuming the grant by Yeshvantráv to be invalid as against his successor, adverse possession would only run against

the plaintiffs from the time of his death in 1871, and the present suit having being filed within twelve years from that date was not barred.

Held, further, that the proceedings in execution of the decree of 22nd June, 1859, including the order of the 18th June, 1881, did not bind the plaintiffs, under section 244 of the Civil Procedure Code (Act XIV) of 1882, the plaintiffs not having been parties to them.

KRISHNÁJI *v.* VITHALRÁV 80

VATANDA'RS' ACT III OF 1874, SEC. 10—*Decree—Execution—Transfer of vatan property from one not vatandár—Construction—Collector's certificate prohibiting delivery of decreed property—Practice—Procedure.*] The plaintiff Shankar and his brother, who were *vatandár deshpándes*, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant Bábáji. Bábáji objected, on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour, and that decree was confirmed by the Special Judge. The plaintiffs being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under section 10 of Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court.

Held, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a *vatandár*, to the daughter who, according to the Collector's certificate, was also not one, section 10 of Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under section 6, clause (1), of the Act.

SHANKAR GOPÁL *v.* BÁBÁJI LAKSHMAN 550

VENDOR AND PURCHASER—*Auction sale by mortgagee of mortgaged property—Conditions of sale—Condition that purchaser shall take such title as vendor can give where vendor has no title at all—Construction—Such condition implies possession of same title in vendor.*] R. having stolen from N. the title-deeds relating to a certain property in Bombay in which he had no interest, but which belonged to N., deposited them with the plaintiffs, to whom he also executed an indenture of mortgage of the property comprised in the deeds to secure the repayment of a loan advanced to him by the plaintiffs. The plaintiffs subsequently sold the property at an auction sale under the power of sale contained in the mortgage. The property was put up to auction under certain conditions of sale, of which the following was one:—"The vendors shall not be bound to give any better title to the purchaser than they themselves possess; and the purchaser shall take the premises sold with such title only as the vendors can give him." Before the sale commenced, a notice on behalf of N. was read out to the persons then present, which stated that she claimed the property as absolute owner, and that R., (who had mortgaged it to the vendors), had no interest in it. The defendant was not present when the notice was read. He did not arrive at the auction until after the bidding had begun, but on his arrival

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he was told of N.'s claim. He was told nothing to make the above condition of sale misleading. He bid for the property, and ultimately became the purchaser for Rs. 1,075. He immediately paid Rs. 275 by way of deposit, and signed an agreement to complete, which had the conditions of sale annexed to it. He subsequently ascertained that R. had no interest in the property, and thereupon he called upon the plaintiffs, (the mortgagees), to make out a good title, or to repay his deposit. The plaintiffs, however, relying on the above condition of sale, required him to complete his purchase; and he having failed to do so, they filed this suit against him, to recover the balance of the purchase-money.

Held, that the defendant was not liable to pay to the plaintiffs the balance of the purchase-money. The suit, although in form a suit to recover the residue of the purchase-money, was virtually one to compel specific performance, and was governed by the principles applicable to such a suit. The purchaser was entitled to say that the above condition of sale implied that the vendors had some title, however defective it might be, and he had received at the auction no information which could be regarded as giving him notice to the contrary.

MOTIVAHOO *v.* VINÁYAK VEERCHAND 1

VENDOR AND PURCHASER—*Specific performance—Suit by vendee against vendor—Delay of vendor in completing—Rescission of contract by vendee—Time of the essence of the contract—Extension of the time stipulated for—Effect of such extension—Conditional waiver of performance within stipulated time—Notice to complete—Unreasonable notice.*

See SPECIFIC PERFORMANCE 658

VRITTI—Jotishipana vritti—Liability to attachment in execution of a decree—Civil Procedure Code (Act XIV of 1882), Sec. 266 (f)—Nature of vrittis under Hindu law.] The *Jotishi vritti*, being a right to receive certain emoluments as a reward for personal service, is not liable to attachment under section 266 (*f*) of the Code of Civil Procedure (Act XIV of 1882).

Semble—Under the Hindu law, *vrittis* are to be regarded as generally *extra commercium*.

GOVIND LAKSHMAN JOSHI *v.* RÁMKRISHNA HARI JOSHI ... 366

WAGER—*Wagering contract—Evidence Act I of 1872, Sec. 92, Proviso I—Evidence—Bombay Act III of 1865—Oral evidence admissible to prove a contract to be a gaming transaction.*] In an action on a contract for the purchase and sale of goods on a certain day the defendant pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, and that the contract was, therefore, void.

Held, that oral evidence was admissible to prove the defence set up by the defendant.

ANUPCHAND HEMCHAND *v.* CHÁMPSI UGERCHAND 585

WILL—*Bequest of property to an unmarried grand-daughter of testator, and after her death to her children, if any, is a gift of life interest in such property.*

See ADOPTION 185

———*Construction—Vesting—Period of distribution—Gift of dividends.*] S., a Portuguese inhabitant of Bombay, by his will, dated 10th March, 1866, devised all his estate, real and personal, to his exe

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cutors in trust, to realize the same, and invest the proceeds thereof in the public funds, and directed as follows :—

"(1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of my sons attain the age of twenty-one years, when his or their share shall be paid unto him or them.

"(2) I desire, further, that whatever may be remaining of the moneys collected by my executors, after all my sons shall have attained the age of twenty-one years and after my daughters shall have been married, shall be distributed, after deducting Rs. 2,000 as dowry given to two daughters, in equal parts between my sons and daughters that may be surviving at the time."

"(5) In case any of my children shall happen to die under twenty-one years, then I give and bequeath the share or shares of him, her, or them, so dying, unto the survivors or survivor of them."

Held, that the gift to the sons, contained in the first clause, was a gift of his share of the dividends to each son on his attaining twenty-one years of age, and that by such gift his share of the *corpus* became vested in each son when he attained that age.

Held, further, that the provisions of the third clause which related to the distribution, did not divest the shares so vested. Clear words must be used to divest an estate once vested.

Held, also, that only such of the daughters as were surviving at the period of distribution, specified in the second clause of the will, were entitled to a share in the estate.

DE SOUZA *v.* VAZ 137

WILL—*Hindu law—Hindu Wills Act (XXI of 1870)—Indian Succession Act (X of 1865), Sec. 179—Probate and Administration Act (V of 1881), Sec. 4—Hindu will made outside Bombay relating to property situate partly within and partly outside Bombay—Probate of such will, effect of—Representation of the estate—Parties to suit—Practice.*] One Lálbhái died at Surat in 1873, possessed of ancestral property situate partly in Bombay and partly in the Surat District. He left a widow, Bái Harkor, and a minor son, Maganbhái. At his death he made a will bequeathing his property to his son, and appointing certain executors to manage the property during the son's minority. The son died in 1877, leaving a minor widow, Magangauri. In 1879 one of the executors obtained probate of Lálbhái's will from the High Court.

In 1884 a suit was filed, on behalf of the minor Magangauri, against her mother-in-law, Bái Harkor, to recover possession of the property covered by the will of Lálbhái.

One of the defences to this suit was that the property in dispute had vested in the executor, who had obtained probate of the will, and that as the defendant held the estate under the executor, the suit was not maintainable without impleading the executor.

Held, that the executor was not a necessary party to the suit. Section 179 of the Indian Succession Act (X of 1865) as incorporated into the Hindu Wills Act (XXI of 1870) did not apply so far as it related to property outside Bombay. The property in dispute was situate in the Surat District. It was joint ancestral property.

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On the father's death it vested in the son by survivorship, and on the son's death it vested in the son's widow, the plaintiff in the present suit. Under the provisions, therefore, of the Probate and Administration Act (V of 1881), sec. 4, (if that Act can be held to operate at all in the Mofussil before a notification is issued under section 2), the estate could not vest in the executor, as it had passed by survivorship to another person long before the Act came into operation.

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WILL—*Letters of administration—Citation—Defective citation—Revocation of letters of administration—Probate, nature and effect of—Act V of* 1881, *Secs.* 16 *and* 50.] S., a Párai, died, leaving a will, whereby he directed that after his death his estate should be managed by his widow Jivibái, and after her death by his sister-in-law Hirábái, and after Hirábái's death by the appellant, his adopted son Hormusji. On Jivibái's death the testator's brother Dosábhái applied for letters of administration, and issued a citation to the appellant Hormusji. Hirábái entered a caveat. No further proceedings were taken, and the matter remained pending. On Hirábái's death, Dosábhái applied for a fresh citation to the appellant Hormusji, but the District Judge held it to be unnecessary, and declined to issue it. Letters of administration were then granted to Dosábhái. The appellant Hormusji subsequently applied for probate of the testator's will. The respondents filed caveats, alleging that the will was void, on the ground of certain bequests contained in it. They further contended that as the appellant had been cited to appear when application was made by Dosábhái for letters of administration, he could not now apply to have letters of administration cancelled.

Held, that the letters of administration granted to Dosábhái should be revoked, and that probate should be granted to the appellant. The only citation which had been issued to the appellant was in 1882, when Dosábhái commenced his proceedings to obtain letters of administration. At that time Hirábái, who was the executrix named in the will (the appellant Hormusji being only named as executor on her death), was still alive, and the citation did not, therefore, call on him to accept or renounce executorship. On Hirábái's death, however, which took place before the actual grant of administration was made to Dosábhái, such a citation was necessary, under section 16 of Act V of 1881, before the grant could be legally made. In default of such a citation the proceedings were defective in substance —a circumstance which constituted good cause for the revocation of the letters of administration, under section 50 of Act V of 1881.

Held, also, that the District Judge was wrong in refusing probate of the will, on the ground that the bequests contained in it were illegal and void. Probate is only conclusive as to the appointment of executors and the validity and contents of the will; and in an application for probate it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition.

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